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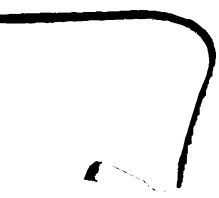
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THE
REPORTS

OF THE MOST LEARNED

Sir EDMUND SAUNDERS, Knt.

LATE LORD CHIEF JUSTICE OF THE KING'S BENCH,

OF SEVERAL

PLEADINGS AND CASES

IN THE

Court of King's Bench,

IN THE TIME OF THE REIGN OF

HIS MOST EXCELLENT MAJESTY KING CHARLES THE SECOND.

EDITED,

WITH NOTES AND REFERENCES TO THE PLEADINGS AND CASES,

By JOHN WILLIAMS,

ONE OF HIS MAJESTY'S SERJEANTS AT LAW.

THE FIFTH EDITION,

By JOHN PATTESON,

OF THE MIDDLE TEMPLE,

AND EDWARD VAUGHAN WILLIAMS,

OF LINCOLN'S INN, ESQRS., BARRISTERS AT LAW.

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A

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THE SECOND PART.

Mellor *versus* Walker.

Hil. 21 & 22 Car. II. Regis Rot. 1284.

Case 1.

See 1 Saund.
339.

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SPATEMAN.

Derbyshire, } **B**E it remembered, that heretofore, to wit, in
to wit. } *Easter* term last past, before our lord the king
at *Westminster*, came *Henry Mellor*, gent., by *Alured Motte-*
ram, his attorney, and brought here into the court of our said
lord the king, then there, his certain bill against *Edward*
Walker, of *Derby*, in the county of *Derby*, gent., in the cus-
tody of the marshal, &c. of a plea of trespass, and there are
pledges of prosecution, to wit, *John Doe* and *Richard Roe*,
which said bill follows in these words (1): that is to say, "Der-

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Memorandum.

(1) The original design and establishment of the court of K. B. was to determine criminal matters, frauds, and breaches of the peace. If, however, any one had a cause of action against an attorney or officer of the court, or against a person in the actual custody of the marshal, for some matter within its jurisdiction, he could not sue him elsewhere, but was obliged to proceed in that court by exhibiting a bill against him, Bro. Bille 6. 31. 4 Inst. 71, 72. The bill was the commencement of the action, being considered as an original writ, *Cowp. 455. Foster v. Bonner*: and

contained the cause of complaint. And as such proceeding was only the occasional business of the court, it was pre-
faced with a memorandum, or note, for the purpose of reminding the court that a civil action was depending. But in the court of C. B. which was instituted for the decision of civil suits, and whose jurisdiction is in ordinary cases founded upon an original writ issued out of *Chancery*, the proceedings are not entered under a memorandum, but the form is, to begin with a recital of the writ on which the action is founded, and proceed with the declaration and

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WALKER.

Declaration in
trespass clau-
sum fregit.

byshire, to wit, *Henry Mellor*, gent., complains of *Edward Walker*, of *Derby*, in the county of *Derby*, gent., being in the custody of the marshal of the *Marshalsea* of our lord the king, before the king himself, for that he, on the 1st day of *April*,

other pleadings to the issue, in this manner: "*Hilary Term* in the 38th "year of the reign, &c. *Middlesex*, to "wit, A. B. was attached to answer C. "D. of a plea of trespass upon the "case. And whereupon, &c." and the form is the same in the K. B. when the suit is by original. See 1 Saund. 339. However the attornies and officers of the court of C. B., or to speak more correctly, the court on their behalf, claimed a privilege that they too should be sued only in their own court by bill, and not by original. And this proceeding, being the occasional, and not the ordinary, business of that court, was also headed by a memorandum in like manner, and for the same reason, as in the proceeding by bill in the court of K. B.

At first, it seems, a bill could not be filed except in term time; afterwards it was allowed to be filed in vacation, intituled as of the preceding term, against any who was in the supposed custody of the marshal, that is, against all persons but prisoners and attornies; for in process of time the court of K. B. acquired a jurisdiction over all civil actions, by supposing the defendant to be in the custody of the marshal, and stating him in the bill to be so. With respect to prisoners in the *actual* custody of the

marshal, it continued to be a rule of the court of K. B. for a long time, that no bill could be filed or declaration delivered against them in vacation. *East*. 17 Geo. 2. *Holloway v. Cross*, cited per *Denison* Justice, in 2 Burr. 1051, 1052: and so it had been held before in 6 Mod. 254, 255. *Tilsden v. Parfriman*, S. C. 1 Salk. 213, 345., where it is said, that there was no way to charge a defendant in custody in vacation, but by making an entry in the marshal's book in the king's bench office, that he should remain in custody at the suit of the intended plaintiff; which was sufficient to charge him, provided he were then in actual custody; for if he were at liberty, he might be arrested. But in the case of *Hutchins v. Kenrick*, 2 Burr. 1048. 1052., where this matter was fully considered, the court held, that the right method of charging a person in custody with a new suit in vacation, is to file a bill as of the preceding term, and to deliver to, or leave for, the defendant being in custody, a copy of the declaration as of the preceding term, and to make an affidavit thereof. However, it does not seem necessary, nor is it the present practice, to make an affidavit of the delivery of the declaration when the defendant is in actual custody. [a] And a declaration may be

[a] Acc. Chitty's Rep. 390. *Williams v. Scudamore*. But in order to detain the prisoner, an affidavit to hold to bail, as in ordinary cases of arrests, must be made and filed with the clerk of the rules; and the sum sworn to must be indorsed by him on the copy of the declaration, before it is delivered to

or left for the prisoner. The mode of proceeding to detain a prisoner in the custody of the sheriff, &c. is nearly the same, except that in this case an affidavit of the delivery of a copy of the declaration must be filed. See Tidd's Practice, ch. 14.

in the 21st year of the reign of our lord *Charles* the 2d, now king of *England*, &c. with force and arms, broke and entered the close of him the said *Henry*, called *Littlefield*, at *Derby*, in MELLOR v.
WALKER.

delivered against a prisoner in vacation, by the *same plaintiff* who had arrested the defendant. 8 Term Rep. 643. *Heron v. Edwards*. So with respect to attornies, it was a rule of the court of K. B. that a bill could not be filed against an attorney or officer of the court in vacation. The reason assigned was, because a bill could only be filed against a privileged person *when present in court*, which is in term time, and not in vacation. 12 Mod. 163. *Broadwaite v. Blackerby*. S. C. 2 Salk. 544. Comb. 465. and *Holloway v. Cross* above cited; and certainly the form of the bill is so. 1 Saund. 28. 202. post, 415. This rule continued to exist much longer than the other respecting prisoners; at length the inconveniences and mischiefs which attended it induced the court to put an end to it. For in many cases an attorney could not be sued at all, and the debt would be unpaid, unless a bill could be filed against him in vacation; as where the statute of limitations would attach before the commencement of the term. So where in penal statutes the action must be brought within three months, it might happen that the time would begin and expire before the term. So if an attorney were an acceptor of a bill of exchange payable the day after the end of *Trinity* term, the holder of the bill had no remedy, but was obliged to wait four months before he could compel payment of the money. The rule seems first to have been relaxed, to prevent an attorney from taking advantage of the statute of limitations; and at last it was fully settled,

that a bill may in *all* cases be filed in vacation against an attorney, as well as any other person. Doug. 312. 3d edit. *Comerford v. Price*. Ibid. 313. note 84. *Lane v. Wheat*. 5 Term Rep. 173. *Waghorne v. Fields*. And without doubt the same rule holds in the court of C. B. [b] But still the bill must be intitled as of the preceding term, and of course appears to be filed of the preceding term. Therefore if the cause of action arose in the vacation, and appears upon the record to have accrued subsequent to the filing of the bill, it would be bad. As where a bill was filed in the vacation after *Michaelmas* term against an attorney, as acceptor of a bill of exchange payable on the 13th of *December*, intitled of *Michaelmas* term preceding; the defendant demurred, showing for cause that the bill was filed before the action accrued, and the court held the demurrer good, but gave the plaintiff leave to amend his bill. The amendment was dictated by the court, and was as follows: "*Michaelmas* term, in the 33d year of the reign of *King George* the Third, (*Middlesex*, to wit) Be it remembered, that on the 14th day of *December*, (a day after the cause of action accrued,) A. D. brought into the office of the clerk of the declarations of the court, according to the course and practice of the court, his certain bill against W. B. gent, one, &c. and filed the same bill as of *Michaelmas* term in the 33d year of the reign, &c. which said bill follows in these words." [c] This form will be

[b] The point seems to be admitted in 6 Taunt. 347. *Crook v. Eyles*; and see ante, vol. i. 35 a, note (f).

[c] Where the bill was entitled as of *Michaelmas* term generally, but the memorandum shewed that it was filed on

MELLOR v. WALKER. the county of *Derby*, and with his feet in walking, and with his certain cattle, to wit, horses, bulls, oxen, cows, swine and sheep, eat up, trod down, and consumed his grass to the value

found adapted to other cases; as where a prisoner is charged in vacation upon a cause of action which arose after the last term; the bill, we have above seen, must be filed of the preceding term, and therefore there must be a special memorandum similar to this.

The memorandum alleges the bill to be exhibited of the term in which the declaration is *entitled*, and the form of it varies according to the fact of the case. It is necessary to observe, that in both courts *the record* is entitled of the term in which the issue, whether of law or fact, is joined, without regarding the term which the declaration and plea, &c. may be of. If the cause of action has arisen *within* the term, the memorandum, which when general, relates to the first day of the term, and would in this instance shew the bill to be exhibited before the cause of action, must be special, stating it to have been filed on some particular day in term after the cause of action, 1 Saund. 40.; and the declaration must also be entitled of the same day. And if the issue be of the same term, instead of a particular day in some preceding term *last past*, the memorandum must describe it to be *in this same term*. If the issue be of a term subsequent to the cause of action, but of the same term with the declaration, the memorandum must shew the bill to have been exhibited on the first particular return day of the term, in which the

declaration was delivered, and describe it to be *in this same term*; as on *Saturday* next, after the morrow of *All Souls*, in this same term. Post, 108. Where the issue is of a term subsequent to the declaration, and within four terms after, the memorandum is in the form of this entry. And where the issue is of a term which is more than four terms after the declaration, the memorandum differs from the present in substituting *the year of the king's reign*, instead of the words *last past*. Post, 51.

When it is material to shew the true time of the commencement of the suit, the evidence of it will in some measure depend upon the form of the record. As where a penal action must be brought within a limited time, the memorandum itself without more will often prove the action to have been commenced within the allowed period, though the record be intitled of a term long subsequent to the delivery of the declaration. But a record of the C. B. does under similar circumstances shew the contrary; and therefore the plaintiff must be prepared with the writ to prove the time of the commencement of the action. So it sometimes happens that a record of the C. B. will be *prima facie* evidence of an action having been brought in due time, when the term in the memorandum in the K. B. record would perhaps be fatal. [d] As where in an action by an attorney for his fees, which by statute

the 28th of *November*, it was held, that evidence was admissible to prove that the bill was *actually filed* on the 24th of *December*. 5 B. & A. 847. *Wilton v. Girdlestone*.

[d] This will frequently be the case

where the action is really commenced too soon; but it can never be the case where the action is really brought in due time, and care is taken to draw up the memorandum properly. Thus, if the time before which the action is pro-

of 40s., then and there lately growing, and other wrongs to him did against the peace of our said lord the now king, and to the damage of him the said *Henry* of 20l., and therefore he brings suit, &c.

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2 Geo. 2. c. 23. s. 23. cannot be commenced until the expiration of one month after he has delivered his bill, it appeared in evidence on the trial, that the bill was delivered on the 30th of *September* 1797, and the record, which was by attachment of privilege in the C.B. was intitled of *Hilary* term 1798. The learned judge who tried the cause was of opinion, that the plaintiff ought to produce the writ to shew that a month had expired before the commencement of the action; and the writ not being produced, the plaintiff was therefore nonsuited. But the court of C. B. set aside the nonsuit, holding that the record was such *prima facie* evidence as would, if uncontradicted, satisfy the 2 Geo. 2.; that such evidence might have been contradicted by the defendant, whose business it was to shew by the writ, that it was really commenced before the time. And on the other hand in penal actions, which are to be brought within a limited time, the plaintiff is bound to produce the writ to shew the commencement of the action within the time, for without it, the record, in C. B., is *prima facie* evidence of it's having been brought after; and if the record in some instances operated against the plaintiff, it was reasonable it should in others operate in his favor; 1 Bos. & Pull. 263. *Webb* one, &c. v. *Pritchett*. It is often necessary to prove the time of the commencement of

the action by the production of the writ itself, and in some actions to plead the time of it's commencement. A bill of *Middlesex* or *latitat*, may be considered by the plaintiff, either as the commencement of the action, or as process to bring the defendant into court, as it best serves his interest. 1 Wils. 141. *Wood* v. *Newton*. It is settled that a bill of *Middlesex*, or a *latitat* without a bill of *Middlesex* previously sued out, 1 Sid. 53. *Dacy* v. *Clinch*. Ibid. 60. *Welden* v. *Greg*. 1 Str. 550. *Hollister* v. *Coulson*. 2 Str. 796. *Crookatt* v. *Jones*, is a good commencement of the suit in a penal action, or to avoid a tender, or save the statute of limitations. 2 Burr. 961. *Johnson* v. *Smith*. 3 Burr. 1243. *Morris* v. *Pugh*. Cowp. 454. *Foster* v. *Bonner*. [c] Therefore if the defendant plead the statute of limitations *before the exhibiting of the bill*, the plaintiff may reply a *latitat* sued out of such a term, and the defendant may rejoin, that the *latitat* was not in fact sued out till the vacation after such preceding term, and after the expiration of the time limited for bringing the action. 2 Burr. 950. *Johnson* v. *Smith*. Sty. 156. *Coles* v. *Sibbye*. So if the defendant plead a tender before the exhibiting of the bill, the plaintiff may reply a *latitat* previous to the tender, and the defendant may rejoin, that there was no cause of action at the time when the *latitat* issued. 1 Wils.

hibited expire in term, the memorandum must be special; and if it be not, the record in K. B. will certainly shew contrary to the truth of the case that the action was commenced too soon. In the instance immediately subjoined, a record of K. B. would have been

equally good evidence as a record of C. B.; for it could not have carried the evidence of the commencement of the action further back than the 6th *November*, which is more than a month from the 30th *September*.

[c] See post, 63 c, note.

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Impar lance.

And now at this day, that is to say, on *Monday* next after the octave of *St. Hilary* in this same term, until which day the

141. *Wood v. Newton*. So where the cause of action appears in *evidence* to have arisen after the first day of term, and there is no special memorandum, in which case, we have above seen, the bill by fiction relates to the first day of the term, it will be sufficient for the plaintiff to give evidence of a *latitat* sued out after the cause of action. 3 Burr. 1241. *Morris v. Pugh*. S. C. 1 Black. Rep. 312. Indeed if it appears so *upon the record*, it is a fatal objection. But if the cause of action be laid on the *first day of the term*, it is good, although there is a general memorandum; as where in an action on promises, the declaration, which was intitled generally of *Michaelmas* term, stated the promises and the breach thereof to have been made on the 7th day of *November* 1785, which was the first day of the term, on demurrer to the declaration for this cause, it was held well enough, because the term for the purpose of delivering the declaration does not begin *till the sitting of the court*, and the promise and the breach might have well taken place before the delivery of the declaration, 1 Term Rep. 116. *Pugh v. Robinson*. It is necessary however, that the bill of *Middlesex*, or *latitat*, should be returned *non est inventus* by the Sheriff, and entered upon the roll, and continued from term to term down to the time of suing out the process upon which the defendant is actually served. 7 Mod. 5. *Atwood v. Burr*, per Holt C. J. 2 Ld. Raym. 883. *Brown v. Babbington*. per Holt. 6 Term Rep. 617. *Harris v. Woolford*, and *Bates v. Jenkinson* there

cited. 3 Bos. & Pul. 330. Post, 63 c, note. See the form of entering a bill of *Middlesex* on the roll 1 Instruct. Cler. 49. 7th edit., and of entering a *latitat*, ibid. 52., and the form of the replication, Lib. Plac. 334. The continuances are mere matter of form, and may be entered at any time; it has even been holden that they may be made by the attorneys in their chambers, 1 Sid. 52. *Dacy v. Clinch*. 6 Term Rep. 618. If indeed a writ be sued out within the time limited by a penal statute, and the plaintiff declare within a year after the return of the writ, which by the general rules of law he may do, provided he is not nonprossed before for want of declaring within two terms, 2 Term Rep. 112. *Worley v. Lee*. 3 Term Rep. 123. *Penny v. Harvey*, it is not necessary to shew the writ returned and continued. 7 Term Rep. 6. *Parsons v. King*. But in general cases the *bill* is the commencement of the action, and the *latitat* only process to bring the party into court; and in that view it is held that a *latitat* may be sued out before there is any cause of action. Cro. Eliz. 271. *Richbell v. Goddard*. Cro. Jac. 561. *Pigot v. Rogers*. 1 Vent. 28. *Hanway v. Merrey*. 8 Mod. 343. *Perry v. Kirk*. 1 Wils. 142. *Wood v. Newton*. 2 Burr. 967. *Johnson v. Smith*. Cowp. 454. *Foster v. Bonner*. Dougl. 62. *Ward v. Honeywood*. And the plaintiff may prove a cause of action arising after the suing out of the *latitat*, and before the filing of the bill, as well in *ailable* as common writs. Term Rep. 4. *Best v. Wilding*. [f] So where it is a record of the C. B. the production

[f] 4 East, 74. *Swancott v. Westgarth*, Acc., in which Lord Ellenborough C. J. intimated that if the defend-

ant were actually arrested before the debt was due, he might have a remedy in an action for damages.

said *Edward Walker* had leave to imparl (2) to the said bill, and then to answer, &c. before our lord the king at *Westminster*, comes as well as the said *Henry* by his attorney aforesaid, MELLOR v.
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of the writ of *capias ad respondendum* is sufficient proof of the time of the commencement of a penal or other action. And it seems settled, that the plaintiff may reply a *capias*, without an original writ first sued out, to a plea of tender, or of the statute of limitations, if it be duly returned, entered and continued, as well as a *latitat*; for a *capias* is now considered to be the actual commencement of the suit in the Common Pleas. 2 Black. Rep. 924, 925. *Leader v. Moxon*. S. C. 3 Wils. 461. 1 Ld. Raym. 434. *Kinsey v. Heyward*. Willes's Rep. 255. *Karver v. James*; tho' the contrary was holden in 1 Ld. Raym. 553. *Mois v. Bruerton*, 2 Ld. Raym. 880. *Brown v. Babbington*. [g] See the form of entering the *capias* on the roll, Imp. Pr. C. B. 631. 4th edit. And if to a plea of tender, or the statute of limitations, the plaintiff reply an original sued out within time, the production of a *capias ad respondendum* sued out within six

years, is evidence of an original having been sued out, for the court will presume it. *Gosling v. Witherspoon*, per Lord Kenyon, *Middlesex* sittings after *Michaelmas* 1788.

(2) The plea appearing on the record to be of a term subsequent to the bill, it is necessary to continue the bill to the plea; for without a continuance the proceeding will be erroneous, unless indeed after a verdict, in which case a discontinuance is cured by statute 32 H. 8. c. 30. or after a judgment by default, where it is remedied by statute 4 Ann. c. 16. But there is no need of continuing the bill down from term to term to the plea, 2 Lord Raym. 872. *Curlewis v. Dudley*. S. C. 1 Salk. 179. Cas. Temp. Hard. 322. *Fletcher v. Richardson*; for the course of the K. B. is to enter an imparlance to the first day of the term that the plea is of: which, we have seen, is the term in which issue is joined, and the record

[g] So in action in K. B. by original, the suing out even a *testatum capias* is a good commencement of the action, although it be irregular; for the plaintiff might cure the irregularity either by applying to the Master of the Rolls for a *capias*, or to the court of K. B. to strike out the *testatum* part of the writ: and the continuances may be entered at any time. 5 B. & A. 452. *Beardmore v. Rattenbury*. In the same case it was held, that the plaintiff need not reply specially, where the plea states the action not to have accrued or the promises not to have been made within six years next before the commencement of the suit. But if the plea refers to the exhibiting of the bill, and the declaration be entitled more than six years after

the cause of action, the plaintiff must reply specially; for the production of a *latitat* within six years, although such *latitat* be a good commencement of the action to save the statute, will not prove the bill to have been exhibited within six years. Where a writ is sued out and the return indorsed upon it in time, it is not necessary that it should be delivered out of the sheriff's office at the same time. 5 B. & A. 489. *Taylor v. Hipkins*. In 3 Brod. & Bing. 212. *Gregory v. Hurrill*, it was held, that a *capias* sued out in K. B. and continued, although not declared on, was sufficient to take a debt out of the statute of limitations, so as to render it a good petitioning creditor's debt to support a commission of bankrupt.

MELLOR V. WALKER. as the said *Edward Walker* by *John Chambers*, his attorney; and the said *Edward* defends the force and injury when, &c. and as to the coming with force and arms, or whatever else is

intituled. As where in the memorandum the bill is alleged to be exhibited in *Michaelmas* term, and issue is joined in *Trinity*, or some other term, following, the imparlance is from *Michaelmas* term to the first day of *Trinity*, or other subsequent term. If the plea be of the same term with the bill, there is not any necessity of an imparlance, or continuance. In like manner it is held not to be necessary to make an entry of an imparlance on the replication, rejoinder, surrejoinder, and the like, though in fact delivered of a subsequent term, for they are presumed to be of the same term with the preceding pleading, 5 Rep. 75. a. *Wymark's* case. Nor is there any continuance entered on the plea in a record of the C. B. or of the K. B. when the proceeding is by original writ; for the declaration and all the other pleadings are supposed to be of the same term.

There is another kind of imparlance, whose general signification means time given to the defendant to plead, and is either of course, or in the discretion of the court. Where the process is returnable on the last return of the term, or even before that period, but the plaintiff has neglected to deliver, or file his declaration and give notice of his having done so, four days exclusive before the end of the term, and the defendant is

completely in court, he is intitled by the practice of both courts to an imparlance, and must plead within the first four days of the following term; and if the plaintiff omit delivering or filing his declaration before the essoign day of that term, and giving notice thereof, the defendant will also be allowed to imparl to the subsequent term. [h] This is called a general imparlance, and is *always to another term*. 6 Mod. 28. *Longvill v. Hundred of Thistleworth*; after which the defendant can only plead in bar, and is not permitted to plead in abatement, or any dilatory plea. 12 Mod. 529. *Anon.* He is not allowed to demand oyer of a deed; Bro. Oyer. 14. 6 Mod. 28. Gilb. C. B. 184. 3d edit.; for oyer cannot be had but during the same term in which the deed is brought into court. 5 Rep. 74. *Wymark's* case. 2 Lutw. 1644. *Simpson v. Garside*. 2 Lev. 142. *Mayor of London v. Gorrey*. S. C. Freem. 400. 1 Term Rep. 149. *Rex v. Amery*, per Buller J. Or to plead to the jurisdiction of the court. Gilb. C. B. 184. Or to claim conusance, 10 Mod. 125. 130. *Case of University of Cambridge*. 2 Wils. 411. *Leasingby v. Smith*. Or to plead a plea of aid-prayer; 2 Bos. & Pull. 384. *Onslow v. Smith*; it being a clear principle of law, that no dilatory plea can be pleaded in another term after a general imparlance. [i] It was

[h] The defendant is never entitled to an imparlance where he has by his own act prevented the plaintiff from declaring in proper time. 2 B. & A. 390. *Page v. Vogel*. For the plaintiff is never bound to declare *de bene esse*. 6 Taunt. 261. *Kent v. Yates*; 2 Bos. & Pull. 126. *Bailey v. Hantler*; 5 T. R. 372. *Rolleston v. Scott*.

[i] Acc. 2 M. & S. 484. *Lloyd v. Williams*. Where an attorney is sued in vacation, the title of the bill as of the preceding term shall not deprive him of his plea in abatement in the following term. 1 Chitty's Rep. 704. *Holme v. Dalby*.

against the peace of our said lord the now king, and also as to the whole trespass aforesaid with the said cattle, except with one gelding and one mare of the said cattle, above supposed to

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formerly holden, that a tender with an uncure priest could not be pleaded after a general imparlance, being considered as a dilatory plea, like a plea in abatement, but it seems the law is now taken to be otherwise, agreeably to what had been determined before. Dy. 300. a. pl. 37. See 1 *Saund.* 33. note (2). If the defendant, being entitled to an imparlance, be desirous of pleading in abatement of the writ, bill, or declaration, he must apply for an imparlance *with a saving of all exceptions to the writ, bill, or count.* This sort of imparlance is called a special one, and in the C. B. is granted of course by the prothonotary upon an application to him within the first four days of the term subsequent to that of the declaration; but in K. B. is grantable only by leave of the court, which is obtained by a side bar rule. If on the plea in abatement it be necessary to make up the issue, whether of law or fact, where the proceeding is by bill, the special imparlance must be entered on the plea, as well to prevent a discontinuance, as to shew the defendant's right to plead such a plea. See the form, Clift. Ent. 21. 1 Lutw. 6. *Gawen v. Surby.* Lill. Ent. 7. *Brown v. Deeble.* And in both courts the practice is to state the special imparlance on the plea, when it is delivered to the plaintiff intitled of the term subsequent to the declaration. 4 Term Rep. 520. 521. *Doughty v. Lascelles.* 6 Term Rep. 369. *Buddle v. Willson.* 7 Term Rep. 447. *Blackmore v. Fleming,* note (d). The pleading of a misnomer in abatement after an imparlance in this form, viz. "And L. L. who is sued by the name of S. L. in his proper person comes and says that "he was baptized, &c." has been held

not to amount to a special imparlance. 4 Term Rep. 520. though the contrary was decided in 1 Black. Rep. 51. *Brewster v. Capper.* S. C. 1 Wils. 261. The form of a special imparlance where the proceeding is by original, is, "And A. B. who is sued by the name of C. B. in his proper person comes, and saving to himself all advantages and exceptions, as well to the writ, as to the declaration aforesaid, prays leave to imparl thereunto here until, &c. and it is granted to him; the same day is given to the said D. here, &c. At which day comes here as well the said D. by his attorney, as the said A. B. in his proper person, and says, &c." Herne, 10. And where the proceeding is by bill, the form is, "And A. B. who is sued by the name of C. B. in his proper person comes, and saving to himself all advantages and exceptions to the said bill, prays leave to imparl thereto, and it is granted to him, &c. And thereupon a day is thereof given to the parties aforesaid, before our lord the king at Westminster, until, &c. to wit, to the said A. to imparl to the bill-aforesaid, and then to answer, &c. At which day, before our lord the king at Westminster, comes as well the said D. by his attorney aforesaid, as the said A. B. in his proper person, and the said A. B. says, &c." Lib. Plac. 2 pl. 15. But the defendant cannot after a special imparlance plead to the jurisdiction of the court; therefore if he be entitled to an imparlance to the next term, and would plead to the jurisdiction, he must have a still more special imparlance, *with a saving of all advantages and exceptions whatsoever.* This is usually denominated a *general special*

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Locus in quo,
part of *Little-*
field.

Derby, an an-
cient borough,
and defendant
a burgess of it.

be done, he the said *Edward* says that he is not guilty thereof, and of this he puts himself upon the country, and the said *Henry* thereof likewise, &c. And as to the residue of the said trespass with the said one gelding and one mare above supposed to be done, he the said *Edward* says that the aforesaid *Henry* ought not to have or maintain his said action thereof against him, because he says that the said close, and also the place in which the said trespass is above supposed to be done, are, and at the said time when, &c. were, 40 acres of land with the appurtenances in *Derby* aforesaid, which said 40 acres of land with the appurtenances are, and at the said time when, &c. and also from the time whereof the memory of man is not to the contrary, were parcel of a certain common field called *Littlefield*, in *Derby* aforesaid. And the said *Edward* further says, that the borough of *Derby*, in the county of *Derby*, is an ancient borough, and that he the said *Edward* is and at the said time when, &c. and long before, was and yet

imparlance, and can only be obtained by an application to the court on motion within the first four days of the next term, and it is in the discretion of the court, governed by the particular circumstances of the case, to grant it or not. They will not grant it for instance, if the defendant has appeared to the process *by attorney*, because a plea to the jurisdiction must be pleaded in person. 2 Black. Rep. 1094. — 1097. *Grant v. Lord Sondes*. [j] The prothonotary has no power to grant this kind of special *imparlance*; a plea under a grant of such an *imparlance* from him, would be a nullity, and the plaintiff might sign judgment, or at least, a respondeas ouster would be awarded. 12 Mod. 529. *Anon.* 1 Lutw. 46. *Wentworth v. Squibb*. 2 Black. Rep. 1094. After such an *imparlance* as this, the defendant is at liberty to plead his privilege. Hard. 365. *Clapham*

v. Lenthall. 1 Lutw. 46. 12 Mod. 529. Gilb. C. B. 210, 211. If the defendant plead in abatement after a general *imparlance*, or to the jurisdiction after a special *imparlance*, the plaintiff may either sign judgment, 4 Term Rep. 520. *Doughty v. Lascelles*. 7 Term Rep. 447. *Blackmore v. Fleming*, note (d), or apply to the court to set aside the plea; or he may demur to it. 6 Term Rep. 369. *Buddle v. Willson*. 1 Wils. 261. *Brewster v. Capper*. 3 Instruct. Cler. 40 [k]. Or the plaintiff may allege the general *imparlance* in his replication by way of estoppel. Clift. 18. pl. 46., 19. pl. 50., 20. pl. 53, 54. 1 Lutw. 23. *Bartelot v. Burton*. 3 Instruct. Cler. 39. But if the plaintiff reply to the plea, instead of demurring, or alleging the estoppel, the fault is cured. 1 Vent. 236. *Dacres v. Duncomb*, per *Hale C. J.*

[j] It may, however, be observed, that in the old entries pleas to the jurisdiction are frequently pleaded by attorney. See Rast. 472.; Clift. 17.; Thomps. 2, 3, 4, 5.

[k] Acc. 2 M. & S. 484. *Lloyd v. Williams*. And the demurrer may be general; for a plaintiff need never demur *specially* to a plea in *abatement*. S.C.

is one of the burgesses of the said borough; and that the burgesses of the said borough from time whereof the memory of man is not to the contrary, until the 11th day of *July*, in the 14th year of the reign of the lord *Charles* the first, late king of *England*, were a body politic and corporate by the name of the bailiffs and burgesses of the borough of *Derby*, and by the same name were used to plead and be impleaded. And the said *Edward* further says, that in and upon the said 11th day of *July*, in the 14th year of the reign of the said lord *Charles* the first, late king of *England*, &c. he the said lord the king *Charles* the first by his letters patent made under his great seal of *England*, bearing date at *Westminster* on the said 11th day of *July*, in the 14th year of his reign aforesaid, did constitute and create the bailiffs and burgesses of the borough aforesaid to be from thenceforth for ever a body politic and corporate, by the name of the mayor and burgesses of the borough of *Derby*, in the county of *Derby*, as by the said letters patent, which he the said *Edward* here into court brings, more fully and at large appears. And the said *Edward* further says, that the bailiffs and burgesses of the said borough from time whereof the memory of man is not to the contrary, until the said 11th day of *July*, in the 14th year of the reign of the said lord *Charles* the first; and the mayor and burgesses of the said borough, on the said 11th day of *July*, in the 14th year aforesaid, and continually from thenceforth afterwards hitherto, have had, and for the whole time aforesaid, have been accustomed to have for themselves, and every burgess of the said borough, common of pasture in the said field called *Littlefield*, whereof, &c. for all their commonable cattle * *levant and couchant within the said borough of Derby*, that is to say, in every two years together successively, when the said field called *Littlefield*, whereof, &c. or any part thereof shall be sown with any kind of corn, after the said corn, in the said field called *Littlefield*, whereof, &c. is reaped, gathered and carried away, until the said field, or some part thereof, shall be sown again with some kind of corn, and in every third year when the said field called *Littlefield*, whereof, &c. lies fresh and fallow, then for the whole year; wherefore he the said *Edward*, on the 1st day of *August*, in the 20th year of the reign of our said lord the now king, which was a third year, when the said field called *Littlefield* did lie fresh and fallow, put the said gelding and mare, which were his the said *Edward*'s own proper cattle, and levant and couchant within the said borough

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The burgesses of the said borough were immemorably a body corporate, by the name of bailiffs, &c. until 11th July, 14 Car. I.

On which day they were incorporated by the name of the mayor and burgesses of the borough of *Derby*.

And prescribes in the said corporation for themselves and every burgess to have common in *Littlefield*, for all their commonable cattle, levant and couchant within the said borough, at certain particular times.

* The words in Italics were omitted in the plea in *Mellor v. Spateman*, 1 Saund. 340.

[3]

And put his cattle into the common,

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which is the
same trespass.

And traverses
that he is guilty
after the field
was sown, and
before the corn
was reaped and
taken away.

of *Derby*, into the said field called *Littlefield*, whereof, &c. to depasture the grass there growing to use his said common, and on that occasion with his feet in walking, and with his said gelding and mare eat up, trod down and consumed the said grass then growing in the said place, in which, &c. as he lawfully might; *which is the same* residue of the said trespass, whereof the said *Henry* above thereof now complains against him. *Without this*, that the said *Edward* is guilty of any trespass in the said place in which, &c. with the said gelding and mare at any time after the said field, or any part thereof, was sown with corn in any year, and before the corn in the same year, in the said field called *Littlefield*, was reaped, gathered and carried away from thence. And this he the said *Edward Walker* is ready to verify; wherefore he prays judgment if the said *Henry* ought to have or maintain his aforesaid action thereof against him, &c.

To this there is a general demurrer, and a joinder in demurrer, and then the entry proceeds:

[4]

Curia advisare
vult.

But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises whereof the parties aforesaid have put themselves upon the judgment of the court, a day therefore is given to the parties aforesaid, before our lord the king at *Westminster*, until day next after to hear their judgment

And a venire
to try the issue.

of and upon the premises, because the court of our said lord the king now here is not yet thereof, &c. And as well to try the said issue above joined, between the said parties to be tried by the country, as, &c. let a jury thereof come before our lord the king at *Westminster*, on the day aforesaid, and who neither, &c. to recognise, &c. because as well, &c. the same day is given to the parties aforesaid there, &c.

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Mellor versus Walker.

S. C. 2 Keb.
678. 676.
1 Sid. 462.
1 Vent. 92.

Where the de-
fendant in tres-
pass justifies at
another time,
and not at the
time in the de-
claration, yet if
it be averred to
be the same
trespass whereof

TRESPASS by *Mellor* against *Walker*: the plaintiff declares, that the defendant on the 1st of *April*, in the 21st year of the reign of the now king, with force and arms broke the close of the plaintiff called *Littlefield*, at *Derby*, in the county of *Derby*, and with his feet in walking, and with certain cattle, to wit, horses, bulls, &c. depastured, trod down and consumed his grass to the value, &c. there growing, and other wrongs, &c.

The defendant, as to all the trespass, except with his feet

in walking, and a trespass with one gelding and one mare, pleads not guilty; and as to that, he pleads that the borough of *Derby* is an ancient borough, and that the defendant at the time when, &c. was and is one of the burgesses of the said borough; and that the burgesses of the said borough from time whereof, &c. until the 11th day of *July*, in the 14th year of the reign of king *Charles* the first, were a body politic and corporate by the name of the bailiffs and burgesses of the borough of *Derby*, and by the same name used to plead and be impleaded; and the defendant further says, that on the said 11th day of *July*, in the 14th year aforesaid, the said late king *Charles* the first, by his letters patent under his great seal, changed the name of the corporation to the name of mayor and burgesses of the same borough; and then the defendant prescribes, that the said bailiffs and burgesses from time whereof, &c. until the said 11th day of *July*, in the 14th year aforesaid, and the mayor and burgesses of the said borough, on the said 11th day of *July*, and always afterwards had, and for the whole time aforesaid had been accustomed to have, for themselves, and every burgess of the said borough, common in the said field called *Littlefield* whereof, &c. for all their commonable cattle, levant and couchant, within the said borough of *Derby*, that is to say, in every two years together successively, when the said field called *Littlefield*, or any part thereof, should be sown with any kind of corn, after the said corn was reaped, gathered and carried away, until the said field, or some part thereof, should be sown again with corn; and in every third year when the said field called *Littlefield* lay fresh and fallow, then for the whole year, &c.; wherefore the defendant, on the 1st of *August*, in the 20th year of the reign of the now king, which was a third year, when the said field called *Littlefield* lay fresh and fallow, put in the gelding and mare aforesaid, which were the defendant's own proper cattle, and levant and couchant within the borough of *Derby* aforesaid, to depasture the grass there growing, using his common aforesaid there, &c. and so justifies the trespass; and avers, that it is the same trespass whereof the plaintiff complains against him; and traverses, without this that the defendant is guilty of any trespass with the said gelding and mare at any time after the said field was sown with grain; and avers, that the corn there growing was taken and carried away. And this, &c. wherefore, &c. upon which the plaintiff demurs in law.

And the exception to the plea was, that the plaintiff has laid

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the plaintiff complains, the plea is good in substance. A traverse that sufficiently answers the material point of the declaration is good.

Da Costa v. Clarke. 2 Bos. & Pull. 257.

[5]

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the trespass in his declaration to be on the 1st day of *April*, in the 21st year of the king, and the defendant has justified the trespass on the 1st day of *August*, in the 20th year of the same king, so that he neither agrees with the time in the declaration, nor shews any reason why he does not agree with it; for the defendant does not say that on the 1st day of *April*, in the 21st year, the field was sown with corn, for which reason he could not justify the trespass at that time; and therefore the defendant ought to have justified the trespass at the precise time laid in the declaration. And the traverse does not help the plea, because he has only traversed the time when the field was sown; but throughout the whole plea, it is not said, whether the field was sown at the time of the trespass laid in the declaration, or not: neither has the defendant traversed the walking with feet at all, and therefore it was said that the plea was bad. It was moved in *Trinity* 22d of the present king, and the court took time to consider.

And it being now moved again in this term, *Hale C. J.*, *Rainsford* and *Morton* concurring, held the plea good enough in substance; for the defendant having averred in his plea, that it is the same trespass of which the plaintiff complains, and the plaintiff having demurred generally, it is only form and not substance, of which no advantage can be taken on a general demurrer. And the traverse has sufficiently answered the material part of the declaration; for if, at the time of the trespass laid in the declaration, the field was sown, then he has traversed it; but if it was not sown, it appears by the plea that the defendant had a good right to put in his cattle; and therefore, taking it either way, the defendant has justified, or traversed, the trespass in the declaration: therefore they gave judgment for the defendant. (3)

(3) This seems to be an informal plea, as well on account of the addition of a traverse, as of its varying from the time in the declaration. The traverse is added after a sufficient confession and avoidance, and therefore bad on a special demurrer; it being averred by the defendant, that the time when he put in the cattle was in a third year, when the field was fallow, and so within the prescription. The true way of pleading such an averment, is agreeable to the

plea in *Mellor v. Spateman*, 1 Saund. 340.; and see also Lib. Plac. 338. The plea admits the trespass, and states a justification which is a legal bar to the action, if the fact be true; and concludes with an averment of its being the same trespass with that which is alleged in the declaration; for which reason it is held to be improper and superfluous to add a traverse. As where in trespass *clausum fregit* laid on the 10th day of *November*, the justification was on the

11th, with an averment of its being the same trespass, it was adjudged that the plea was good without a traverse, and the addition of it, being specially shewn for cause of demurrer, made the plea bad. 2 Lutw. 1457. *Hargrave v. Ward*. So where in trespass *clausum fregit*, on the 7th day of May, the defendant justified the trespass on the 10th of May, and averred it to be the same trespass, the court on demurrer determined that the plea was good without a traverse of the trespass on the 7th of May. 1 Buls. 138. *Vastenope v. Tayler*. And also where in an action of trespass and false imprisonment on the last day of October, the defendant justified on the 13th of August, under a warrant from the sheriff, and averred it to be the same trespass, the court was of opinion that the plea was good without a traverse, the day not being material. Cro. Car. 228. *Tyler v. Wall*. So where in trespass for taking goods, the defendant justified at another time under a writ of *feri facias*, and concluded with an averment of it's being the same trespass, and on demurrer the objection was, that the defendant, varying in the time of taking from that alleged in the declaration, ought to traverse any other taking, for the same goods might be taken at several times, and the averment of its being the same trespass was not sufficient; but it was decided that the plea was sufficient without a traverse. Sir T. Jones, 146. *Allen v. Chamming*. And in 1 Str. 694. *Courtney v. Satchwell*, which was trespass and false imprisonment, the defendant justified under a process out of the sheriffs' court in London, *quæ est eadem*, &c. and traversed being guilty *aliter vel alio modo*, the traverse was held ill on a special demurrer, the *quæ est eadem*, &c. being itself a sufficient traverse. See also Yelv. 122, 123. *Lane v. Alexander*. 1 Saund. 13, 14. *Hawe v. Planner*.

Ibid. 22. *Bennet v. Filkins*. Ibid. 209. *Salmon v. Smith*. Ibid. 312. *Res v. Kilderby*. 2 Salk. 641, 642. *Green v. Goddard*. In like manner, the reason of adding the traverse here appears to be, because the defendant justified the trespass at another time than that in the declaration, the trespass complained of being laid on the 1st day of April, and the trespass justified on the 1st day of August. See *White v. Stubbs*. Post, 294. It seems, however, to have been long since established, that the plaintiff is not tied to the time laid in the declaration, nor the defendant to that mentioned in the plea; but the former is allowed to give evidence of a trespass committed at any time before the commencement of the action, Co. Lit. 283. a. and the latter is at liberty to prove his justification on any other day. As the time is not material in evidence, neither is it in pleading, and therefore the general rule seems to be, that the plea ought to follow the day laid in the declaration. 1 Saund. 14. *Hawe v. Planner*. But the justification may be such as to make the time material, and then the plaintiff may vary in his replication from the day in the declaration without a departure. Thus where in an action of assault, battery, and false imprisonment on such a day, the defendant pleads a special matter of justification at another day, so that the day becomes material; as where he justifies as mayor or constable at such a time, but in truth, the trespass complained of was done by him when he was not mayor or constable, the plaintiff may reply an imprisonment, or, in other words, may new-assign the trespass at another day, and it is no departure, for the day in the declaration is not material. And in the present case, if the defendant had justified on the same day in the declaration, but in truth had put in his cattle at the time the field, or any part of it, was sown, and that was

the trespass the plaintiff intended by his declaration, he might shew that fact by way of new assignment. So in other actions, where the day in the declaration is not material, the plaintiff may, when it is rendered necessary by the defendant's plea, vary in his replication from the day, and it is no departure; but if the day in the declaration be material, as in an action upon a bond, bill of exchange, promissory note, and the like, the plaintiff in his replication cannot vary from the day without a departure. Cro. Eliz. 168. *Smith v. Hillier*. 1 Lev. 110, 111. *Lee v. Rogers*. 1 Salk. 222. *Webley v. Palmer*. Ibid. 223. *Howard v. Jennison*. 1 Lord Raym. 121. *Serle v. Darford*. 2 Lord Raym. 1015. 1 Str. 21. *Cole v. Hawkins*. 2 Str. 806. *Matthews v. Spicer*.

With respect to the averment in the plea of its being the *same* trespass, a distinction is taken between a justification on the same, and on another day; in the former it is held to be unnecessary in some actions of trespass to conclude with such an averment, but in the latter it is thought to be a right thing so to conclude. As where in trespass *clausum fregit* on the 1st day of May, the defendant pleaded a *licence* on the same day, it was adjudged that there is no need of averring it to be the same trespass. So it is where in trespass for taking

goods the defendant justifies on the same day; or pleads *son assault* on the same day to an action of assault and battery. But if he justify on another day, or at another place, he ought to conclude his plea with an averment of its being the *same* trespass. 21 H. 7. 32. pl. 52. S. C. Fitz. *Trespass*. 248. Bro. *Trespass*. 219. and the same diversity is recognised in 1 Bulst. 138. *Vastenope v. Tayler*. Skin. 387. *King v. Tebbart*. But this distinction seems now to be of little use, as indeed it necessarily would be, as soon as it was fully established that the day and place in the declaration in such actions is not material, for the plea when properly drawn will follow the day in the declaration; but if it should vary from it, so that there is an apparent difference on the record between the trespass in the declaration, and that which is justified, the distinction will take place, and the plea must conclude with such an averment. 2 Lutw. 945, 946. *Rowel v. Dyon*. And at this day in a plea of *son assault*, or of a *licence*, it is neither necessary, nor very usual, to add an averment of its being the same trespass; but in trespass for taking goods, an instance can hardly be put of a justification in which it is not necessary to conclude with that averment, although the plea follows the day in the declaration. [7]

[7] Where the defendant justifies under process, the date of which he must of course set out, and which is subsequent to the day laid in the declaration, or where he pleads any other justification which requires a statement of dates, or is confined to a particular time, and it happens that the day laid in the declaration is inconsistent with those dates, or not included in that time, the defendant must allege a new day on which he avers that the trespass was committed, otherwise his plea would be manifestly incongruous. Willes, 202. *Bell v. War-*

dell. And in such case he must either traverse all other days, or conclude his plea with an averment of *quæ est eadem*; but if he do both, the plea will be bad on *special* demurrer. If he follows the day in the declaration, which he ought always to do, unless he thereby renders his plea incongruous, it should seem that the averment of *quæ est eadem* can never be necessary; but as it does no harm, the present practice is, to add it in almost every case, the traverse of all other days having fallen into disuse.

So the *place* alleged in the declaration in assault and battery, or trespass for taking goods is immaterial, being only laid for a venue; and unless the justification be local, the defendant is bound to follow it; for if he justify at another place, either with or without a traverse of the place in the declaration, the plea is bad on a special demurrer. Co. Litt. 282. b. 1 Saund. 85. *Wright v. Ramscot*; and the rule is the same in actions upon the case, assumpsits on parol promises, and in many other transitory actions. Thus, where in trover and conversion of six oxen in *London*, the defendant pleaded that he seized them as waifs in the manor of D. in *Essex*, and traversed that he was guilty in *London*; it was adjudged that the plea was bad, because it did not contain any local matter to make the place material. Cro. Eliz. 174. *Bullock v. Smith*. [m] And where in false imprisonment at *Bristol*, the defendant justified arresting the plaintiff at *Gloucester* under a commission of rebellion, and traversed the imprisonment at *Bristol*, the plea was held bad, because the matter of the justification was transitory, and not local, and therefore the defendant ought to have justified in the place where the action was brought. Ibid. 184. *Cowleigh v. Edwards*. So where in assault and battery in *London*, the defendant pleaded son assault at D. in the county of S. and traversed that he was guilty in *London*; on demurrer it was adjudged that the plea was bad, because the defence being transitory, the defendant could not plead it in another place, and traverse the place where it was alleged. Ibid. 842. *Purset v. Hutchings*.

See further, 1 Lutw. 345. *Pyke v. Pulleyn*. Ibid. 618. *Treene v. Hiccox*, 6th exception. 2 Lutw. 1437, 1438. *Searle v. Darford*. S. C. 1 Ld. Raym. 120. 3 Lev. 113. *Bridgewater v. Betheway*. 1 Leon. 39. *Queen v. Ld. Vaux*. 2 Mod. 271. *Barker v. Warren*. Carth. 326. *Martin v. Wilsford*. But where the cause of the justification is local, as if in an action of false imprisonment in *Middlesex*, the defendant justify as constable of the vill of B. in another county, or in another place in the same county, arresting the plaintiff for a breach of the peace; or as a justice of the peace in another county; or justify damage feasant, or because the defendant offered to enter into his house, in another county, or in another place in the same county; the defendant must traverse the county of *Middlesex*, and not rest there, but also traverse every other county or place except that which his justification is confined to. As where in trespass for taking goods in *London*, the defendant pleaded that he let a dwelling-house in *St. Paul, Covent Garden*, to the plaintiff, and distrained the goods for rent, and traversed that he was guilty in *London*, or elsewhere out of *St. Paul, Covent Garden*; and upon demurrer the traverse was held ill, because the defendant might be guilty in another house within *Covent Garden*. 1 Sid. 293. It seems the form of the traverse ought to have been, "Without this, that he the said A. (the defendant) is guilty of the said trespass in *London* aforesaid, or elsewhere, except in the said dwelling-house in *St. Paul, Covent Garden* aforesaid." See also Co. Litt.

[m] It was held, in fact, that the plea was bad, for that it amounted to the general issue. Had the action been *trespass* for taking the cattle, the plea

would have been good, as may be collected from the rest of the note: for the cause of justification as to the *taking* would plainly have been local.

282. b. Cro. Eliz. 167. *Smith v. Hillier*. Ibid. 504. *Thomson v. Clerk*. Ibid. 705. *Peacock v. Peacock*. Ibid. 842. *Purset v. Hutchings*. 3 Lev. 227. *Bodle v. Wilkins*. Cro. Jac. 45. *Wadhurst v. Damme*. Cro. Jac. 372. *Bateman v. Woodcock*. 2 Lutw. 1437. *Searle v. Darford*. There seem to be two grounds for this strictness in the plea; one is, that it may appear to the court that the defendant acted under the authority of law; and the other is to ascertain with correctness the place of the justification, that it may be known where the *venire facias* is to be awarded; and yet the traverse added to the plea seems to be an immaterial one, for the plaintiff cannot take issue on the traverse, but must either answer the cause of justification, or traverse it, according to circumstances; which proves that it is an immaterial traverse. 1 Ld. Raym. 121. *Searle v. Darford*. S. C. 2 Lutw. 1438. [n] In the same manner it is necessary in the present practice of changing the venue on motion, that the affidavit in support of the application should be positive that the plaintiff's cause of action arose in the county of A. (to which the venue is sought to be changed) and not in the county of B. (where the venue is laid), or elsewhere out of the county of A.; for if material evidence arises in two counties, the venue may be laid in either, or in a third county, and the court will not change it, because the usual and necessary affidavit cannot be made; and this is the ground of the rule, that if the plaintiff will undertake to give some evidence of the matter in issue in the county where the action is laid, the

court will not change the venue. 2 Salk. 669. *Anon.* 1 Wils. 178. *Herring v. Durant*. 2 Term Rep. 238. *Scott v. Brest*. Ibid. 275. *Watkins v. Towers*. 7 Term Rep. 583. *Mayor of London v. Cole*. 7 Rep. 1. *Bulwer's case*. [o] The reason why the defendant, when his justification consists of transitory matter, is bound to follow the place in the declaration and cannot traverse it, seems to be, because he would otherwise be able to change the venue in a transitory action to any county he likes, in subversion of an ancient principle of law, which allows the plaintiff to lay the venue in such an action in any place he pleases. Co. Litt. 282. b. 1 Lutw. 14. *Marshall v. Burnet*. And on the other hand, the reason of traversing the place in the declaration when the justification is local, we have seen, is, because the defendant by this means may change the venue to the place alleged in the plea; for if issue be joined on the cause of the justification, and the locality of it be admitted thereby, then, according to another ancient principle of law, the venue must come from that place, whether it be in the same county, or in another; and if the cause be not tried there, the judgment at the common law was erroneous. Thus in Cro. Eliz. 261. *Ford v. Brooke*, cited in 1 Saund. 247. *Craft v. Boite*, where in an action of slander for perjury at Dale, in *Essex*, the defendant justified that the plaintiff was perjured at *Westminster*, and the venue was awarded to be from *Westminster* in *Middlesex*. So where in an action for calling the plaintiff a thief at Dale, in *Essex*, the defendant justified because the

[n] This seems to be a mistake; the plaintiff has his election either to take issue on the defendant's traverse, or to

traverse the defendant's justification. See 1 Saund. 22. n. (2).

[o] As to changing venues, see 1 Saund. 74. and the notes there.

plaintiff had committed a robbery at *Salé* in the same county, the plaintiff replied, &c. *de injuriis suis propriis absque*, &c. the venue was awarded to be from *Salé*. Ibid. 870. *Clerk v. James*. Also, where in error on a judgment in case for words laid to be spoken at B. in the county of *Salop*, the defendant pleaded he spoke them as a witness upon his oath on an issue tried at C. in the county of *Somerset*; the plaintiff replied, *de injuriis suis propriis*, &c. and the cause being tried by a venire at B. the error was that it ought to have been by a venire of C. where the justification arose; and it was held clearly to be a mis-trial, and not aided by the statute of Jeofails, wherefore the judgment was reversed. Ibid. 468. *Bowyer's case*. S. C. Moor, 410. But where the matter of the local justification is false, being pleaded merely for the purpose of drawing the trial to that place, the plaintiff may traverse it, and the issue is to be tried in the county where the action is laid. As where in false imprisonment in the ward of F. in *London*, the defendant justified under a judgment and writ of execution in *Sandwich* in *Kent*, and the taking and imprisoning there, and traversed his being guilty in *London*; the plaintiff replied that the defendant was guilty in *London*, and traversed that there is any such record in *Sandwich*. Moor, 350. *Paramour v. Verwold*. S. C. Pop. 101. S. C. Cro. Eliz. 418. S. P. 2 Lutw. 1438. But the law has been altered in these respects by the statutes 16 & 17 Car. 2. c. 8. and 4 Ann. c. 16. s. 6.; by the former of which it is enacted, that after verdict no judgment shall be arrested or reversed, for that there is no right venue, so as the cause of action were tried by a jury of the proper county or place where the action was laid; and the latter statute directs that the *venire facias* shall be awarded out of the body of the

county where such issue is triable. It was adjudged in the above-mentioned case of *Craft v. Boite*, and which has been adhered to ever since, that where an issue, joined on a local justification in the county of *Oxford*, was tried by a jury of *London*, where the action was laid, this mis-trial was aided by the said statute of *Charles* the 2d. The statute of *Ann* having thus abolished all distinction of venues, and extinguished the doctrine of mis-trials in the same county, and the statute of *Charles* the 2d. having also remedied after verdict an erroneous award of the *venire facias* into another county, it follows, that the defendant cannot compel the plaintiff to try the cause in the county where the matter of the justification arose. Hence it hath been the constant practice for a great length of time past to try the cause in the county where the venue is laid in the declaration. The grounds and reasons of the different manner of pleading, when the justification is transitory and when local, which were founded upon a solid and substantial point of law, being put an end to by these statutes, it is now reduced to mere form; and the court, as in other cases of form, will not lend a willing ear to captious objections to the plea, but will perhaps think that the averment of its *being the same trespass*, which includes in itself a traverse of the place in the declaration, is sufficient at this day without the addition of a formal traverse of it. However it is proper and safe to adhere to the usual form, for probably the court will feel themselves bound by the course of precedents, as their predecessors did in a former case; where, in trespass, which was laid at *Hereford*, in the county of *Hereford*, for taking the plaintiff's cattle and driving them away, and converting them to his use, the defendant pleaded not guilty as to the conversion, and as to the taking and driving them away

justified as bailiff of the manor of A. and that such proceedings were had in the court of the manor, that a distringas issued directed to the defendant, who by virtue thereof distrained the plaintiff's cattle to enforce his appearance at the manor court, and concluded *quæ est eadem transgressio*, without traversing the place laid in the declaration. The court, after two arguments upon a special demurrer for want of a traverse, gave judgment that the plea without a traverse was not an answer to the trespass at *Hereford*, and *Lee C. J.* cited *Cro. Eliz.* 705. which says that a traverse is necessary, and thought the plea bad in substance. *Wright J.* was of the same opinion; but *Denison J.* doubted whether it was bad in substance, though he was clear it was so in form, and *that* being shewn for cause of demurrer, judgment was given for the plaintiff. [*p*]

When the trespass in the plea appears on the record to be the same trespass with that in the declaration, or is alleged to be so by an averment of its being the same trespass, and the plaintiff traverses the cause of justification, he thereby admits it to be the same trespass, although in fact it be a different one; and the plaintiff cannot afterwards give evidence at the trial that the trespass in the plea is a different one from that which he intended in his declaration; he is estopped by his admission; for instead of traversing the matter of the plea, he ought to have denied the averment of its being the same trespass.

This seems to be the foundation of a new assignment; as where a licence, or son assault is pleaded, and the defendant has in the former case exceeded the licence, and in the other, had once beat the plaintiff in his own defence, but afterwards beat him without any reason, and there is only one count in the declaration; the plea in plain language is, "you gave me a licence to cut down trees," or, "you assaulted me, and I beat you in my own defence, which I had a right to do, *and that is the trespass you complain of in the declaration.*" if the plaintiff deny the licence, or that he assaulted the defendant, he admits that the trespass in the plea is the same with that in the declaration; therefore if the defendant prove a licence from the plaintiff to cut down trees, or an assault by him on the defendant, at any time; (the day being immaterial, as we have already seen, in the plea as well as in the declaration); the plaintiff will not be allowed to shew in evidence, that the trespass he intended in the declaration was for cutting down trees *at another time*, without his licence, or a battery *at another time* when he did not assault the defendant. [*q*] The same observation will be found to apply to most cases where a new assignment is held to be necessary; though in many of them, consisting of intricate and perplexed facts, the reason does not appear so obvious.

[*p*] This is the case of *Benjamin v. Howell*. 1 Wils. 81. There seems to be no good reason why the averment of *quæ est eadem* should not be considered a good traverse of the *place* in the declaration, as much as it is of the *time*. If it be so considered, another consequence seems to follow, which the learned Serjeant does not appear to have

contemplated, namely, that the addition of a traverse will render the plea liable to a *special demurrer*, as it does where the *time* in the plea varies from that in the declaration. The safest way, therefore, at present, is to omit the *quæ est eadem*, and add the traverse.

[*q*] As to pleading a licence, see 1 Saund. 300 *a.* note. [*g*] And as to

Jeffreson, executor of Jeffreson, *against* Morton,
and Dawson, and others, Tertenants of *Yarway*.

Case 2.

Easter, 21 Car. II. Roll. 291. or 201.

England,
to wit.

BE it remembered, that Sir *Orlando Bridgman*,
bart. keeper of the great seal of our said lord
the now king of *England*, &c. on *Monday* in three weeks
of *Easter*, in the same term, before our said lord the king at
Westminster, with his own hand delivered here into the court
of our said lord the king, a certain record (1) had before our
said lord the king in his chancery at *Westminster*, in the
county of *Middlesex*, in these words: Pleas before our lord

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and others.

Scire facias by
an executor
upon a recog-
nizance in
chancery
against the ter-
tenants, ven-
dees of the
conusor.

(1) Though the plaintiff should die
within a year after he has obtained judg-
ment, his personal representative cannot
have execution against the defendant
without a *scire facias*. Fitz. Execution.
143. where *scire facias* seems to be in-
serted by mistake instead of *feri facias*.
15 H. 7. 16. b. 1 Roll. Abr. 900 (P.)
pl. 1, 2.; nor, in case of the death of
the defendant within that period, can the
plaintiff have an *elegit* under the statute
of *Westminster* 2d. c. 18. against his
lands in the hands of his heir, or terre-
tenants, or generally any other execution
without a *scire facias* against his heir and
terre-tenants, or personal representative,
although he may in some cases have a
feri facias against his goods in the hands
of his executor, as we have already seen.
See 1 Saund. 219. e. f. *Wheatley v. Lane*.
So where the conusee dies within a year,
his executor cannot have an *elegit* upon
a recognizance at common law without
a *scire facias*; nor, if the conusor dies
within that time, can the conusee have

an *elegit* against his heir, or terre-
tenants, without such writ, F. N. B. 597.
D.; the rule being, that where a new
person, who was not a party to a judg-
ment or recognizance, derives a benefit
by, or becomes chargeable to, the exe-
cution, there must be a *scire facias* to
make him a party to the judgment, or
recognizance. 1 Ld. Raym. 245. *Pen-
oyer v. Brace*. S. C. 1 Salk. 319, 320.
2 Ld. Raym. 768. *Queen v. Ford*.
2 Inst. 471. At the common law, if the
plaintiff did not sue out execution *within*
a year and a day after judgment in per-
sonal actions, or recognizance acknow-
ledged, he could not have a *scire facias*,
but the plaintiff or conusee was obliged
to bring an action of debt on the judg-
ment or recognizance. This being a
tedious process, the statute *Westminster*
2d. (13 Ed. 1.) c. 45. gives a *scire fa-
cias* upon a judgment in *personal actions*,
and upon a recognizance, *after* a year
and a day; but a *scire facias* lay at the
common law after that time on a judg-

the point respecting an assault at an-
other time, see 1 Esp. 38. *Randle v.*
Webb. As to traversing and new-as-

signing at the same time, see 1 Saund.
300. and the notes there.

JEFFERSON
v. MORTON
and others.

Scire facias.

R. Y. entered
into recogni-
zance to T. F.

the now king in his chancery at *Westminster*, in the county of *Middlesex*, of the term of the *Holy Trinity*, in the 20th year of the reign of our lord *Charles* the 2d, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. *Middlesex*, to wit. Our lord the king has sent to the sheriff of the county of the *Middlesex* his writ close in these words, to wit: *Charles* the 2d, by the grace of God of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to the sheriff of *Middlesex* greeting, whereas on the 16th day of *August*, in the 12th year of our reign, *Robert Yarway*, citizen and merchant-tailor of *London*, appearing personally before us in our chancery, acknowledged

ment in a *real* action. 2 Inst. 469. Co. Litt. 290. b. 291. and Lord *Holt* seems to have been of opinion, that a *scire facias* might always have been sued out upon a judgment in personal actions after a year and a day. 1 Salk. 258. *Withers v. Harris*. [a] It is called a *scire facias* from these essential words in the writ, "*quod scire facias prefat. T.* (the defendant) *quod sit coram, &c. ostensurus si quid pro se habeat aut dicere sciat quare, &c.*" whence it appears that the defendant or conusor is to be warned to *plead in bar of the execution*; and therefore a release of all executions is held to be a good plea; it is also considered in the nature of an action, and therefore a release of *all actions* is a bar to it; for whenever the defendant may *plead* to any writ, whether original, or judicial as this writ is, it is in law an action. Co. Litt. 290. b. 291. 3 Mod. 189. *Obrian v. Ram*; and the plea may pray judgment *if the plaintiff ought to have or maintain his action*. 2 Wils. 251. *Grey v. Jones*. 2 Black. 1227. *Pulteney v. Townson*. 1 Term Rep. 268. *Fenner v. Evans*. 2 Term Rep. 46. *Winter v. Kretchman*: see also *Skin*. 682. *Woodyeer*

v. Gresham. If execution be sued out after the year and day without a *scire facias*, it is not void, but voidable only by writ of error. 3 Lev. 404. *Patrick v. Johnson*. 1 Salk. 261. *Howard v. Pitt*, in which *Russel's* case, 4 Leon. 197. to the contrary is denied. If a recognizance be acknowledged in chancery, that is, in the ordinary legal court there, it may hold plea of a *scire facias* to have execution; but if issue be joined, or there be a demurrer to part, and issue on the residue, the chancellor delivers the whole record to the court of K. B. but not to any other, and judgment is given there upon the demurrer as well as upon the issue. Latch. 3. *Blaxton's* case. 1 Eq. Cas. Abr. 128. And it is not necessary the issue should be tried at bar, it may be tried at *Nisi Prius*. Cro. Car. 313. *Eyres v. Taunton*. From the words "with his own hand," it seems, the chancellor formerly used to deliver the record to the court of K. B. himself; but the present course is to deliver it by the clerk of the petty bag; for what is done by his officer may be said to be with the proper hand of the chancellor, 1 Eq. Cas. Abr. 129. [b]

[a] 2 Salk. 600. S. C. 2 Ld. Raym. 806. S. C.

[b] See further as to *scire facias*, post, 71 a. and the notes there.

himself to owe to *John Jeffreson*, of *High Holborn*, in your county, esq. 4000*l.* of lawful money of *England*, which he ought to have paid him on the feast of *St. Bartholomew* the apostle then next following, as appears to us by an inspection of the rolls of our said chancery, and did not pay the same to the said *John* in his life-time, or, after the death of him the said *John*, to *John Jeffreson*, gent. executor of the last will and testament of the said *John Jeffreson* deceased, as it is said, we command you that, by good and lawful men of your bailiwick, you make known to the said *Robert*, that he be before us in our said chancery in three weeks from the day of the *Holy Trinity* next coming wheresoever it shall then be, to shew if he have, or can say any thing for himself why the said money (2) ought not to be levied of his lands and chattels, and delivered to the said executor according to the force, form, and effect of the said recognizance, and that you have there the names of those by whom you shall so cause it to be made known to him, and this writ. Witness ourself at *Westminster*, the 26th day of *May*, in the 20th year of our reign.

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Sheriff com-
manded to warn
R.

At which said three weeks of the *Holy Trinity*, before our said lord the now king in his said chancery here, to wit, at *Westminster* aforesaid, comes the said *John Jeffreson*, the now plaintiff, by *John Wilkinson*, his attorney, and the sheriff of the county of *Middlesex* aforesaid, to wit, *Sir Dennis Gauden*, knt. and *Sir Thomas Davies*, knt. now here returns that the said *Robert* is dead; whereupon our lord the now king sent his other writ close directed to the sheriff of *Middlesex* aforesaid, in these words; *Charles* the 2d, by the grace of God of *England*, *Scot-*

Sheriff returns
that R. is dead.

(2) The *scire facias* ought to conclude *quare executio fieri non debet*, and if the words "*non debet*" are omitted, it is said, the writ is bad and not amendable. 2 Lutw. 1281, 1282. *Baxter v. Peach*, 3 Keb. 190. *Manel and Colloe's* case. If the defendant dies after judgment, the conclusion of the *scire facias* against his personal representative must be according to the situation of the cause at the time of his death; as where the defendant died after interlocutory judgment and damages assessed on a writ of inquiry, but before final judgment, the conclusion of the *scire facias* against his execu-

tor must not be to shew cause *wherefore a new writ of inquiry should not be awarded*; for the damages were assessed before the defendant's death, and the writ would therefore be quashed; but it ought to be, *why the damages assessed should not be adjudged to the plaintiff*. 1 Wils. 243. *Goldsworthy v. Southcott*. If the defendant had died after the award of the writ of enquiry, and before the execution of it, the conclusion must be *why the damages ought not to be assessed and recovered by the executor*. Lill. Ent. 647.

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Another scire
facias.

[7]

land, France, and Ireland, king, defender of the faith, &c. to the sheriff of *Middlesex* greeting, whereas on the 16th day of *August*, in the 12th year of our reign, *Robert Yarway*, citizen and merchant-tailor of *London*, personally appearing before us in our chancery, acknowledged himself to owe to *John Jeffreson*, of *High Holborn*, in your county, esq. 4000*l.* of lawful money of *England*, which he ought to have paid to him on the feast of *St. Bartholomew* the apostle then next following, as appeared to us by inspection of the rolls of our said chancery, and had not paid the same to the said *John* in his lifetime, or, after the death of him the said *John*, to *John Jeffreson*, gent. executor of the last will and testament of the said *John Jeffreson* deceased, as it was said, we lately commanded you by our writ that, by good and lawful men of your bailiwick, you should make known to the said *Robert Yarway*, that he should be before us in our said chancery, at a certain day now past, wheresoever it should then be, to shew if he had or could say any thing for himself why the said money ought not to be levied of his lands and chattels, and delivered to the said executor according to the force, form, and effect of the said recognizance; and that you should have there the names of those by whom you should so cause it to be made known to him, together with our said writ: at which day, in our said writ contained, you returned to us in our said chancery that the said *Robert* is dead, as by the return thereof remaining of record on the (3) files of our said chancery more fully appears, therefore we command you that, by good and lawful men of your bailiwick, you make known to the heir (4) of the said *Robert*,

(3) The reason of using this word is, because the legal proceedings of the court are not enrolled as in the courts of common law in *rolls*, but remain on *files* in the office of the petty bag, 4 Inst. 80.

(4) It is the usual way to join the heir and tenants of the lands [c], or, as they are generally called, terre-tenants in the writ of *scire facias*. F. N. B. 597, note (a) Cro. Eliz. 3, 6. *Heydon's* case. Cro. Car. 295. *Eyres v. Taunton*. 2 Salk. 598. *Panton v. Hall*. Lill. Ent. 384, 385; but it is said, that if it be re-

turned that the heir has no lands, the writ may proceed against the tenants of the lands without him, F. N. B. *ubi supra*: and it may be either against the tenants of the lands generally, without naming them, or against them by name. F. N. B. *ubi supra*. 2 Salk. 600. *Proctor v. Johnson*; but the former is the best form, and is now constantly used, for if the plaintiff undertake to name them, he must name them all, and if he do not, those who are named may plead in abatement. Comb. 282. *Berisford v.*

[c] As to what is meant by "tenants of the lands," see post, note [q].

and also to the tenants of the lands and tenements which were of the said *Robert* at the time of the recognizance aforesaid, or at any (5) time after, that they be before us in our chancery in three weeks from the day of *St. Michael* next coming, wheresoever we shall then be, to shew if they have or can say any thing why the said 4000*l.* ought not to be le-

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Sheriff com-
manded to warn
the heir and ter-
tenants of R. Y.

Cole. The writ, whether on a judgment recovered against the ancestor, or a recognizance acknowledged by him, which is in the nature of a judgment, may also be brought against the heir without the tenants of the lands; the plaintiff, however, cannot have execution against the heir of any more than a moiety of the lands which were his ancestor's at the time of the judgment or recognizance, or after. For it is held, that the heir is chargeable as tenant of the lands, and not as heir, and that an action of debt does not lie against him on the judgment or recognizance, as it does on the bond, of his ancestor, but a *scire facias* only to have execution of the ancestor's lands in his hands. 3 Rep. 12. *Sir W. Harbert's case*. Dy. 271. a. pl. 25. *Sir W. Jones*, 87, 88. *Bowyer v. Rivitt*. S. C. 3 Bulst. 317. Palm. 419. Poph. 153. And as the execution which the plaintiff, or conusee, is intitled to sue out against the tenant of the lands, is a writ of *elegit* by virtue of the statute of *Westminster* 2d, (13 Edw. 1.) c. 18. by which no more than a moiety of the lands is delivered by the sheriff; therefore the execution against the heir, who is liable only as tenant of the lands, must necessarily be the same. And as when execution is taken out against the ancestor in his life time, the plaintiff or conusee can extend only a moiety of his lands by the writ of *elegit*, so the execution is the same after his death; for the *scire*

facias is merely for the purpose of enabling the plaintiff or conusee to sue out execution against the lands of the ancestor in the hands of the heir, which he is prevented from doing by the death of the ancestor; see *Skin*. 682. *Wood-yeer v. Gresham*; but it does not alter the nature of the execution any more than it does the nature of the debt. 2 Atk. 608. *Stileman v. Ashdown*. S. C. Amb. 13—17. Another reason assigned is, that the heir is not named either in the judgment or recognizance; the form of the judgment being, that the plaintiff do recover his debt, or his damages assessed, and of the recognizance, that he is content, and grants that execution shall be made of his lands and tenements. 3 Rep. 12. b. *Sir W. Harbert's case*. 3 Bulst. 321. *Boyer v. Revett* per *Dodderidge J.* And though the heir plead a false plea to the *scire facias*, it does not vary the execution, for the remedy given by the statute of *Westminster* 2d cannot be enlarged or altered by the plea of the heir, or tenant of the lands. *Sir W. Jones*, 87, 88. Carth. 93. *Brandlin v. Millbank*. S. C. Comber. 162. However in some respects the heir is considered as such; for if he be an infant, he may to the writ of *scire facias* pray his age, and the parol will demur. 3 Rep. 19. b. *Sir W. Harbert's case*. [d]

But if an action be brought against the heir on an obligation made by his an-

[d] So the parol will demur, in case of an action against the heir upon the bond of his ancestor; but not in an ac-

tion against an infant devisee under the stat. 3 W. & M. c. 14. s. 2. 4 East, 485. *Plasket v. Beeby*.

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vied of the lands and tenements which were of the said *Robert* at the time of the said recognizance, or at any time after, and delivered to the said executor according to the force, form, and effect of the said recognizance (6), and have there the

cestor in which he has bound his heirs, the heir is not charged as tenant of the lands, but as a debtor in the *debet and detinet*; for if he be charged in the *detinet* only, it was error at the common law, but is now aided after verdict by statute 16 and 17 Car. 2. c. 8.; and in case judgment is given against him, the whole of the land descended which he was seised of at the time of suing the original writ, or filing the bill, may be delivered to the plaintiff in execution, though the plaintiff was not intitled to have any part of the land in execution against the ancestor himself. [e] Dy. 373. b. Plow. 441. *Davy v. Pepys*. 3 Rep. 12. a. *Sir W. Harbert's case*. Sir W. Jones, 87. *Bowyer v. Rivitt*. S. C. Pop. 153. 2 Atk. 608. *Stileman v. Ashdown*. See the form of the extent against an heir. Tidd. Prac. Forms, 356. And the reason seems to be, because the common law allowing an action of debt against the heir on the bond of his ancestor, and the executor being intitled to the whole of the personal estate, the plaintiff would derive no fruit from his action, unless he could take the real estate in execution. 3 Rep. 12. a. And as the obligee may sue either the heir or executor, the heir cannot plead that there is an executor, and that he has assets. Bro. Assets per Descent. 33. Plow. 439. b. *Davy v. Pepys*. Dy. 204. b. 3 Lev. 189. *Davies v. Churchman*. 2 Atk. 426. 1 P.

Will. 203. The heir, however, is not liable any further than to the value of the land; and therefore to an action against him on the bond of his ancestor, the heir may plead payment by him to other bond creditors, before the commencement of the action, to the full value of the lands. 1 Str. 665. *Buckley v. Nightingale*. [f] But in order that the heir should be no further liable, it is necessary for him to confess the action, and shew the certainty of the assets. Plow. 440. *Davy v. Pepys*. 2 Roll. Abr. 71. 1 Str. 665. (the form of the plea, and of a prayer of judgment for the assets confessed, together with an award of an inquiry of the annual value of them, and of the writ of inquiry, may be seen in Rast. Ent. 172. b. 173. a. Lib. Plac. 173, 174.) For if issue be taken on the quantity of assets, and it be found that the heir has other lands by descent, 7 Mod. 44. *Smith v. Angel*; or if he plead a fact which he knows to be false, and it be found against him; as where he says that he has *nothing* by descent, and the jury find that he has *something*, however small it may be, and insufficient to discharge the debt, the plaintiff is intitled to a general judgment for the debt, damages, and costs, and to sue out the like execution against him as on a judgment for his own debt; and therefore the plaintiff may have a *capias ad satisfaciendum*, *fieri facias*, or an *elegit* for a moiety of

[e] That is, at common law; for by the stat. of Westminster 2d, he might have had an *elegit* against the ancestor.

[f] But he cannot plead that he has laid out money beyond the amount of

the rents in *repairs* of the premises descended; and *quare*, whether the plea would be aided by an averment that the *repairs* were *necessary*. 1 T. R. 454. *Shetelworth v. Neville*.

names of those by whom you shall so cause it to be made known to them, and this writ; witness ourself at *Westminster*, the 10th day of *June*, in the 20th year of our reign.

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At which said three weeks of *St. Michael* before our said

all the lands which the heir is seised of whether by descent or otherwise. *Plow. 440. Davy v. Pepys. 2 Leon. 11. Hinde and Lyon's case. 2 Roll. Abr. 70. (C.) pl. 2. Dy. 149. a. Sir W. Jones, 87. Bowyer v. Rivitt.* So it is where the heir pleads payment by a co-obligor. *Carth. 93. Brandlin v. Millbank. S.C. Comb. 162., or pleads a bad plea, 2 Ld. Raym. 783. Smith v. Angell. S.C. 1 Salk. 354. 7 Mod. 40. 3 Bac. Abr. 30.;* but it seems certain, from the present liberality of the courts, that the defendant would be permitted to amend his plea, if the defect arose from mispleading, and the plea be an honest and fair one. And a special judgment, that the plaintiff shall recover the debt, damages and costs, *to be levied out of the lands descended*, given without the plaintiff's consent, is erroneous. *2 Roll. Abr. 71. pl. 8, 9. 2 Ld. Raym. 786. Smith v. Angell.* There is some difference of opinion with respect to the nature of the judgment when obtained against the heir on demurrer, or by default. In *Bowyer v. Rivitt*, Sir W. Jones, 88. *S.C. Poph. 153.,* it is laid down, "that though the judgment against the heir be a general one when he pleads a false plea, yet if the judgment be *by confession*, *nil dicit*, or *non est informatus*, it must be only of the assets descended," and the same is held in *Dy. 81. a. Luson's case. Finch's Law, 384.* But in *Davy v. Pepys*, *Plow. 440.,* it is said, "that if the heir do not confess the action, and shew the certainty of the assets, but pleads that he has nothing by descent, or if judgment be given *by default*, or *nil dicit*, or *confession*, or on any other matter or ground what-

soever, without confessing and shewing the certainty of the assets, the plaintiff shall have execution of his other land, or of his goods, or of his body, as he should have for the debt of the heir himself on his own bond." And the same law is holden in the following authorities. *2 Roll. Abr. 70. (C.) pl. 2, 3, 4, 5. 2 Roll. Abr. 71. (D.) pl. 1. Moor, 522. Barker v. Borne. S.C. Cro. Eliz. 692. Dy. 81. a. in margin. 2 Atk. 205. Kinaston v. Clark. 2 Ld. Raym. 786. Smith v. Angell. S.C. 1 Salk. 354. 7 Mod. 44.,* in which last case Lord Holt says, "that the authority of *Davy v. Pepys* has been murmured at, but there is not a word of it which is not good law." And the better opinion seems to be agreeable hereto, and indeed it appears to be confirmed by the legislature itself; for by the statute of frauds, 29 Car. 2. c. 3. s. 11. it is provided, "that no heir who is chargeable by reason of any estate or trust made assets in his hands by that act, shall by reason of any kind of plea, or confession of the action, or suffering judgment by nient dedire, or any other matter, be chargeable to pay the condemnation out of his own estate; but execution shall be sued of the whole estate so made assets in his hands by descent, in whose hands soever it shall come after the writ purchased; in the same manner as it is to be at and by the common law, where the heir at law pleading a true plea, judgment is prayed against him thereupon:" So by statute 3 Will. & Mar. c. 14. s. 6. it is enacted, "that if judgment be given against the heir by confession of the action, without

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lord the now king, in his said chancery here, to wit, at *Westminster* aforesaid, comes the said *Joseph Jeffreson*, now plaintiff, by his said attorney, and the sheriff of the county of *Middlesex* aforesaid now here returns, that by virtue of the writ to him

"confessing the assets descended, or upon demurrer, or *nihil dicit*, it shall be for the debt and damages without any writ to inquire of the lands, tenements or hereditaments so descended." But a special judgment may sometimes be more beneficial to the plaintiff than a general one; for if the heir should not have any lands besides those which he has by descent, the plaintiff can have only a moiety delivered to him by an *elegit* on a general judgment, whereas he is intitled to the whole on a special judgment; and therefore it is holden that the plaintiff may suggest that the heir has particular lands by descent, and pray execution of the whole of them. Sir W. Jones, 87. *Bowyer v. Rivitt*. 2 Roll. Abr. 71, 72. (D.) pl. 3. 1 Bro. Cha. Cas. 490. Arg. The plea of *non est factum* of the ancestor is an exception to the rule; for if it be found false, it does not alter the judgment, but the lands descended only are liable to execution. Cro. Car. 437. *Clothworthy v. Clothworthy*.

If the heir has a reversion expectant on the term or lease for years, it is the opinion of Lord Holt, which seems to be well founded, that he cannot plead the term in delay of execution, though there are some precedents to that purpose, as Herne, 307. 1 Lutw. 442, 443. *Smith v. Boughton*. Lib. Plac. 150. pl. 106. 1 Str. 665. *Buckley v. Nightingale*; but he ought to confess assets in possession without taking notice of the term, the freehold and inheritance amounting to such assets; for the common law before the statute of *Glocester*, 6 Edw. 1. c. 11., looked upon a term as of no value, and therefore did not pro-

tect the interest of the termor, but permitted the tenant of the freehold to destroy it by suffering a recovery in a real action, though by collusion. 2 Inst. 321. And the confession of assets in possession cannot affect the interest of the termor or lessee for years in the land; for if the plaintiff sue out a *levari facias*, the term or lease will be a complete defence to an ejectment brought on the return of the extent. 2 Ld. Raym. 784, 785. *Smith v. Angell*. S. C. 1 Salk. 354, 355. S. P. 2 Wils. 49. *Villers v. Handley*. So in a late case, where an ejectment was brought on the return of an *elegit* against the defendant, who was in possession of the premises under a lease for years prior to the date of the plaintiff's judgment, the learned judge who tried the cause being of opinion that the defendant, having a legal title antecedent to the plaintiff's, ought to prevail, though the defendant had received a notice from the plaintiff that he did not intend to disturb his possession, nonsuited the plaintiff, which was afterwards confirmed by the court. 8 Term Rep. 2. *Doe v. Wharton*. However the judgment creditor is not without his remedy, for he may give the tenant notice after the return of the *levari facias* or *elegit*, to pay him the whole or a moiety of the rent, as the case may be; and if he neglects or refuses so to do, distrain for it. 2 Vent. 328. *Dighton v. Greenvil*. Viner's Abridg. Apport. D. 4. *Campbell's case*. But where the heir has only a reversion expectant on the life of another, he may plead it, and the plaintiff may take judgment of assets *quando acciderint*. Dy. 373. b. Carth. 129. *Kellow v.*

directed, by J. B. and J. M., good and lawful men of his bailiwick, he had caused to be made known to *John Morton, Humphry Wiggan, and Thomas Richardson*, tenants of two dwelling houses with the appurtenances in *Gray's Inn Lane*, JEFFRESON
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Rowden. 2 Ld. Raym. 784. *Smith v. Angell*. Lib. Plac. 208. pl. 218.

With respect to the declaration against the heir, it is necessary to observe, that where the lands have descended from the obligor to another *who has died seised*, and from him to the defendant, the descent must be stated specially, as that the defendant is the heir of A., (who died last seised) who was the heir of the obligor; and so it must be, where there have been several intermediate descents; for if the declaration be against the defendant as *heir of the obligor*, and it appear in evidence on the plea of *riens per descent from the obligor*, that the defendant is *heir of the heir of the obligor*, it is a fatal variance. Thus where the declaration was against the defendant as brother and heir of the obligor, and it being found, on the issue of *riens per descent from him*, that he died seised in fee leaving a son, who entered and *died seised* without issue, leaving the defendant his uncle, the obligor's brother, his heir at law; the court gave judgment for the defendant, for he had nothing as *immediate* heir to his brother, but to his nephew. Cro. Car. 151. *Jenk's case*. See Lill. Ent. 147. So where in debt against the defendant as heir of B. it appeared in evidence, on the issue of *riens per descent from B.*, that he died seised in fee leaving the defendant his daughter, and his wife with child of a son, who was afterwards born and lived an hour after his birth, it was held that this evidence did not support the issue, for the defendant had nothing from the fa-

ther the obligor, but the lands came to her by descent as heir of her brother, *who was last seised*. 2 Roll. Abr. 709. pl. 62. S. C. cited in 3 Mod. 256. *Kellow v. Rowden*. And so is Dy. 368. a. [g] But if the intermediate heirs have not *had actual seisin* of the fee which descended from the obligor, it seems unnecessary to notice them in the declaration; as where A. being seised in fee bound himself and his heirs in a bond, and having two sons, B. and C., limited the estate to himself for life, remainder to B. his eldest son in tail, reversion to his own right heirs, and died; B. entered and died, leaving a son D., who died without issue, upon whose death, the estate tail being extinct, the reversion came into possession, and descended in fee on C., the youngest son of A., who was the heir as well of D. as of A.; in debt against C. on this bond, the plaintiff declared against him as heir of A., and on *riens per descent from A.* it was objected that the intermediate descents ought to have been specially stated, but it was adjudged that the declaration was proper; for although B. and D. had each of them such an interest in the reversion in fee, as that they might have sold, charged, or forfeited it, yet they had not *actual seisin* thereof in possession so as to be either assets in their hands, or to make a *possessio fratris* to prevent the brother of the half blood from inheriting, but they were *seised* only of the estate tail, and the father being the person who was last seised of the fee, it was sufficient to charge the defendant

[g] This seems to be a mistake, for the passage in Dyer is *contra*.

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in the parish of *St. Andrew, Holborn*, in his bailiwick, now or late in the tenure or occupation of H. F. and E. D., or their assigns, and also to *Richard Dawson* and *Alexander Orpwood*, tenants of twelve dwelling-houses with the appurtenances in

as heir to him, according to the well known rule of law upon the subject in Co. Litt. 11. b. 15. a. Carth. 126. *Kellow v. Rowden*. S. C. 3 Mod. 253. 1 Show. 244. 3 Lev. 286.; and see Bro. Discent. 14. 30. 8 Term Rep. 219. *Doe v. Whicelo*. It is held to be unnecessary to state how the defendant is heir, for it may not be in the plaintiff's knowledge; as where the defendant is the nephew or cousin of the person who died last seised, it is enough to charge him generally as his heir. Thus in debt upon bond against the defendant as heir of his ancestor, it was objected on demurrer, that it was not stated in the declaration *how* the defendant was heir; but the court over-ruled the objection, and took a difference between an action *by* and *against* an heir; in the former case he must shew his pedigree, and how heir, for it lies within his knowledge; but in the latter it is not necessary, for he is a stranger, and it would be hard to compel him to set forth another's pedigree. 1 Salk. 355. *Denham v. Stephenson*. S. C. 6 Mod. 241. In *formedon* it must be shewn how cousin. Bro. Brief. pl. 47. So in all cases where a man claims as *cousin and heir*, he must shew how; but not when he claims as brother or son and heir. Per *Dodderidge J.* Godb. 275. pl. 388. *Godfrey and Dixon's case*, 12 Mod. 619. *Blackborough v. Davis*, Shower, 249. *Kellow v. Rowden*. Per *Holt C. J.*: But a son need never shew his cousinage. Ibid. However it is a matter of form, and must be specially shewn for cause of demurrer. Hob. 232. *Heard v. Barker-ville*. And cousinage need not be stated in the writ, but only the count.

At the common law if the heir had *bond fide* aliened the lands which he had by descent, before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent *at the time of suing out the writ, or filing the bill*, and the obligee had no remedy at law, though in equity the heir was responsible for the land. 1 P. Will. 777. *Coleman v. Winch*. S. C. Prec. in Chan. 512. 1 Roll. Abr. 269. (C.) pl. 2. 5 Mod. 123. *Redshaw v. Hester*. Carth. 245. *Gree v. Oliver*. 2 Atk. 204. *Kinaston v. Clark*. But if he had made a fraudulent alienation before the action, it was void at the common law, and is so now by the statute 13 Eliz. c. 5., which is in this respect declaratory of the common law, and the obligee may either have a general judgment against the heir, or a special one, and take out execution of the land in the hands of the alienee. As where an action was brought against the defendant as heir, who pleaded *riens per descent* on the day of suing out the writ, and it was found that before the commencement of the action the defendant had aliened the assets of covin to defraud the plaintiff of his debt; the court was of opinion that it was well found for the plaintiff on the issue of *riens per descent*, and gave judgment for him. Dy. 149. a. in the margin. 1 Roll. Abr. 269. (C.) pl. 3. 5 Rep. 60. a. *Gooch's case*. 2 Roll. Abr. 684. pl. 4. But now by statute 3 W. and M. c. 14. s. 5. reciting, "that several persons being heirs at law, to avoid the payment of such just debts as, in regard of the lands, tenements and hereditaments descending to them, they have by law been

Shire-lane, in the parish of *St. Clement Danes*, in his said bailiwick, now or late in the several tenures or occupations of S. P. widow, J. C. M. R., D. J., E. R., H. T., W. J., W. C., J. P., T. S., R. P., B. B., and their assigns, which said seve-

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“ liable to pay, have sold, aliened or
“ made over such lands, &c. before any
“ process was or could be issued against
“ them,” it is enacted, “ that in all cases
“ where any heir at law shall be liable
“ to pay the debts of his ancestor in
“ regard of any lands, &c. descending
“ to him, and shall sell, aliene, or make
“ over the same before any action
“ brought, or process sued out against
“ him, that such heir at law shall be an-
“ swerable for such debt or debts, in an
“ action or actions of debt, *to the value*
“ *of the said land so by him sold, aliened,*
“ *or made over*; in which case all cre-
“ ditors shall be preferred as in actions
“ against executors and administrators;
“ and such execution shall be taken out
“ upon any judgment or judgments so
“ obtained against such heir, *to the*
“ *value of the said lands*, as if the same
“ were his own proper debt or debts;
“ saving that the lands *bond fide* aliened
“ before the action brought, shall not
“ be liable to such execution.” And by
section 6th it is enacted, “ that where
“ any action of debt upon any specialty
“ is brought against any heir, he may
“ plead *riens per discent* at the time of
“ the original writ brought, or the bill
“ filed against him, and the plaintiff may
“ reply that he had lands, &c. from
“ his ancestor *before the original writ*
“ *brought, or bill filed*; and if upon
“ issue joined thereupon it be found for
“ the plaintiff, *the jury shall enquire of*
“ *the value of the lands, &c. so descend-*
“ *ed*; and thereupon judgment shall be
“ given, and execution shall be awarded
“ as aforesaid; but if judgment be given
“ against such heir by confession of the
“ action, without confessing the assets

“ descended, or upon demurrer, or *nil*
“ *dicit*, it shall be for the debt and da-
“ mages, without any writ to enquire of
“ the value of the lands, &c. so de-
“ scended.” Whenever the plaintiff re-
plies according to this statute, he is not
intitled to a general judgment as he was
at common law, but can recover only
the value of the land sold, as found by
the jury, be it what it may. Carth. 354.
Redshaw v. Hesther. S. C. Comb. 344.
5 Mod. 119. 122, 123. And the jury
must find the value, for if they neglect
to do so, the court will award a *venire*
de novo. 10 Mod. 18, 19. *Jeffry v.*
Barrow. That which the jury are di-
rected to find is the *gross* value, in
which respect it differs from the writ of
inquiry at common law, for that was to
inquire the *annual* value. If the heir
has *not* sold the land, it seems the plain-
tiff may nevertheless reply according to
the statute; and, if the defendant be
possessed of personal property equiva-
lent to the lands, it will in general be a
prudent thing in the plaintiff, and the
most equitable proceeding towards the
defendant, to do so; for as the statute
obliges the jury to find the value, and
directs a general judgment and execu-
tion for so much money proportionable
to the value, the plaintiff may levy the
debt out of the defendant's personal
estate, and he will be protected from
paying any more than the amount of the
property which he has from his ances-
tor. Carth. 354. *Redshaw v. Hesther*.
For if another bond creditor should af-
terwards bring an action against him, he
may plead the judgment and execution,
or payment without an execution, in bar
of the action, in which plea he must

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ral dwelling-houses were the (7) dwelling-houses of the said Robert Yarway, deceased, at the time of the recognizance aforesaid, that they should be before our said lord the now king, in the said chancery here at this day, to shew and

aver that the sum levied or paid is to the value of the land which he has by descent. 1 Str. 665. *Buckley v. Nightingale*. However the plaintiff, instead of replying according to the statute, may take issue on the plea of *riens per descent*, and in that case the jury must not inquire of the value of the lands, but the same proceeding is to be pursued as at common law. Barnes, 444. *Mathews v. Lee*. The replication given by the statute does in some measure vary from that at the common law; the form of the latter is to take issue on the plea, and conclude to the country, thus, "And the said A. says, that he by reason, &c. ought not to be barred, &c. because he says, that on the day of suing out his original writ, (or exhibiting his said bill,) to wit, on, &c. the said B. had sufficient lands and tenements by hereditary descent as heir to the said C. in fee simple, wherewith he might have satisfied the said A. the debt and damages aforesaid, to wit, at, &c. and this he prays may be inquired of by the country, &c." Rast. ent. 172. Lib. Plac. 180, 181. 428. Lill. ent. 147.; but the replication given by the statute, after stating that the heir had lands by descent before the commencement of the action, concludes with an averment, and is in this form, &c. because he says, "that before the day of suing out the original writ, (or exhibiting his said bill) to wit, on, &c. the said B. had sufficient lands and tenements by hereditary descent as heir to the said C. in fee simple, wherewith he might have satisfied the said A. the debt and damages aforesaid, to wit, at, &c. and this he is ready to verify; where-

fore he prays judgment, and the debt aforesaid, together with his damages on occasion of the detention of that debt, to be adjudged to him, &c." and the defendant in his rejoinder takes issue on this allegation. See the form 1 Richardson C. P. 522. 5 edit. 2 Richardson, 295, 296, 297. Soon after the act, an objection was taken to a replication drawn in the last-mentioned form, because the plaintiff, it was said, had put the value of the lands in issue by the words, "wherewith he might have satisfied the said A. the debt aforesaid," which ought to have been omitted, for the statute is express that after the issue tried, the jury shall inquire of the value, so that it is matter of inquiry only *ex officio*, and not to the point of the issue: but the court upon debate held the replication proper, and that if those words had been omitted, it might have been a good cause of objection; for the statute does not give occasion to alter any more of the usual replication in this case, than the time concerning the assets by descent; and the conclusion, which before the statute was to the country, must now be with an averment, that the defendant may have an opportunity of answering the new matter alleged in the replication. Carth. 353, 354. *Redshaw v. Hesther*. Hence it appears how necessary it is to know with certainty what judgment may be had against the heir at the common law; for the statute has not altered it in any other respect than when a verdict is found for the plaintiff on the replication given by the statute; in which case the plaintiff is, as we have seen, now entitled to recover at law the gross value of the

propose, as by the said writ he was commanded : and further that there was no heir (8), nor were there any other tenant (9) or tenants of any other lands or tenements which were of the said *Robert Yarway* at the time of the said recognition in his bailiwick to whom he could so cause it to be made known.

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Sheriff returns
that there is no
heir.

land descended, which he could not obtain before, without the assistance of a court of equity.

So if the ancestor had devised the lands, a creditor by specialty had not any remedy at common law against the devisee. 2 Atk. 292. *Plunket v. Penon*. But by the statute 3 W. & M. c. 14. s. 2. " reciting, that it is not reasonable " or just that, by the practice or continuance of any debtors, their creditors should be defrauded of their just debts, and nevertheless it hath often " so happened, that where several persons, having by bonds, or other specialties, bound themselves and their heirs, and have afterwards died seised in fee-simple of and in manors, messuages, lands, tenements and hereditaments, or had power or authority to dispose of, or charge the same, by their wills or testaments, have, to the defrauding of such their creditors, by their last wills and testaments devised the same, or disposed thereof, in such manner as such creditors have lost their said debts," it is enacted, " that all wills and testaments, limitations, dispositions or appointments, of or concerning any manors, &c. or of any rent, profit, term or charge out of the same, whereof any person at the time of his or her decease shall be seised in fee-simple in possession, reversion or remainder, or have power to dispose of the same by his or her last will and testament thereafter to be made, shall be deemed and taken only as against such creditor or creditors as aforesaid, his, her, or their heirs, successors, executors, adminis-

" trators and assigns, and every of " them, to be fraudulent, and clearly, " absolutely, and utterly void, frustrate, " and of none effect, any pretence, " color, feigned or presumed consideration, or any other matter or thing to " the contrary notwithstanding." And by section 3. " for the means that such " creditors may be enabled to recover " their said debts, it is enacted, that in " the cases before mentioned, every " such creditor or creditors shall and " may have and maintain his, her, or " their action of debt upon his, her, or " their said bonds and specialties, " against the heir and heirs at law of " such obligor or obligors and such " devisee or devisees jointly, by virtue " of this act ; and such devisee or devisees shall be liable and chargeable " for a false plea by him or them " pleaded, in the same manner as any " heir should have been for any false " plea by him pleaded, or for not confessing the lands or tenements to him descended." And by section 4. it is enacted, " that where there shall be " any limitation or appointment, devise " or disposition, of or concerning any " manors, &c. for the raising or payment of any real and just debt or debts, or any portion or portions, " sum or sums of money, for any child " or children of any person other than " the heir at law, according to, or in " pursuance of any marriage contract, " or agreement in writing, *bona fide* " made before such marriage, the same, " and every of them, shall be in full " force ; and the same manors, &c. " shall and may be holden and enjoyed

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And the said *John Morton, Humphry Wiggan, and Thomas Richardson*, by *John Wilkinson* their attorney, and the said *Richard Dawson* and *Alexander Orpwood* by *Sir Cyrill Wich*, knt. their attorney on the same day here likewise come: and thereupon the said *John Jeffreson*, the now plaintiff, prays that the said *John Humphry, Thomas, Richard, and Alexander* may

" by every such person or persons, his, her, and their heirs, executors, administrators, and assigns, for whom the said limitation, appointment, devise or disposition was made, and by his, her, and their trustee or trustees, his, her, and their heirs, executors, administrators and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions shall be raised, paid and satisfied." And by section 7. it is also enacted, " that all and every devisee and devisees, made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements, and hereditaments to him or them devised shall be aliened before the action brought;" that is, the plaintiff shall recover from the devisee the value of the lands so aliened. This statute was made to remedy the defect in the statute 13 Eliz. c. 5. of fraudulent conveyances, and to extend it to fraudulent devisees. 2 Atk. 205. *Kimaston v. Clark*, Com. Rep. 256. *Amand v. Jersey*. But it is held that this act does not extend to any settlement, or disposition, made by the obligor by deed in his life time, whether voluntary or otherwise; for it prevents the descent to the heir, in which respect alone he is liable, and the creditor cannot follow the land in the hands of the grantee, inasmuch as a bond is not any lien upon the land, as a judgment or recognizance is; and the object of the act was to guard against any imposition upon the obligor in his last illness. 1 Equ. Abr. 149. pl. 7. *Parlowe v. Weedon*. S.C. cited in Prec. Chan. 521. *Brunsdon v. Stratton*, and in Cas. Temp. Talb. 64. *Jones v. Marsh*; in which Lord Talbot said that Mr. *Vernon* disapproved of this opinion of Lord *Macclesfield*, and never forgave him for it. This statute extends only to debts, in which the testator has bound himself by bonds or other specialties, and not to damages for breaches of covenants or contracts under seal made by him. And therefore it has been held, that an action of covenant does not lie upon this statute against the heir and devisee to recover damages for a breach of covenant made by the deviser, but the remedy thereby given is confined to cases where debt lies. 7 East, 128. *Wilson v. Knubley*. As to the form of the declaration against the heir and devisee jointly under this statute, see Clift. Ent. 243. pl. 19. Lill. Ent. 145. Ibid. 529, 530. 2 Richard. C. P. 241. It is held, that the proviso operates by way of exception upon such devisees as are for payment of debts, leaving the law just as it stood before the making of the act. 2 Atk. 292. *Plunket v. Penson*; and therefore a devise for the payment of debts is not within the statute. 2 Vez. 590. *Earl of Bath v. Earl of Bradford*. Willes's Rep. 521. *Gott v. Atkinson*; nor a devise for payment of debts, out of the rents and profits only. 2 Atk. 104. *Ridout v. Earl of Plymouth*. 1 Brown. Ch. Cas. 311. *Lingard v. Earl of Derby*, 7 Ves. 323. *Bailey v. Ekins*. But if the devisee do not provide for the payment of debts in a manner which is practicable

answer to the writ aforesaid, &c. And the said *John, Humphry, Thomas, Richard, and Alexander* say, that the said *John Jeffreson*, the now plaintiff, ought not to have execution against them the said *John, Humphry, Thomas, Richard, and Alexander* JEFFRESON
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and can be enforced, it is a fraudulent devise within the statute. 2 Brown. Ch. Cas. 614. *Hughes v. Doublen*. [A]

With respect to what shall be assets by descent, it is laid down as a general rule, that though the ancestor *devise* the estate to his heir, yet if he take the same estate in quantity and quality that the law would have given him, the devise is a nullity, and the heir is seised by descent, and the estate assets in his hands. As where a man, seised of land in fee on the part of his mother, devises it to his heir on the part of his mother in fee, the heir is in by descent. 1 Salk. 242. *Reading v. Royston*. S. C. Prec. Chan. 222. 2 Ld. Raym. 829. Com. Rep. 123. S. P. 2 Leon. 11. *Hinde v.*

Lyon. Dy. 124. a. Plow. 545. *Paramour v. Yardley*, and note *f.* in the English translation. So where a man, seised in fee on the part of his mother, devised to his executors for sixteen years for payment of his debts, remainder to his heir on the part of his mother, it was held that the heir took by descent, for it is no more than if the deviser had made a lease for 16 years, and afterwards devised his reversion to the heir. 3 Lev. 127. *Hedger v. Rowe*. So where one devises to another for life, remainder to his heir in fee, the heir shall take the reversion by descent, and yet the law would have thrown the estate immediately on the heir by descent, if there had been no devise. 1 Roll.

[A] But it is no objection to a devise for payment of debts, that it directs simple contract debts to be paid before specialties. Cooper, 45. *Millar v. Horton*.

By stat. 47 Geo. 3. st. 2. c. 74. it is enacted, "that from and after the passing of this act, when any person, being at the time of his death a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements, hereditaments, or other real estate, which he shall not by his last will have charged with or devised, subject to or for the payment of his debts, and which before the passing of this act, would have been assets for the payment of his debts due on any speciality in which the heirs were bound, the same shall be assets to be administered in courts of equity for

" the payment of all the just debts of
" such person, as well debts due on
" simple contract as on specialty; and
" that the heir or heirs at law, devisee
" or devisees of such debtor, shall be
" liable to all the same suits in equity
" at the suit of any of the creditors of
" such debtor, whether creditors by
" simple contract or by specialty, as
" they were before the passing of this
" act liable to at the suit of creditors
" by specialty, in which the heirs were
" bound: provided always, that in the
" administration of assets by courts of
" equity, under and by virtue of this
" act, all creditors by specialty, in
" which the heirs are bound, shall be
" paid the full amount of the debts due
" to them, before any of the creditors
" by simple contract or by specialty
" in which the heirs are not bound,
" shall be paid any part of their de-
" mands."

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That R. J. is a
tenant, and
no scire facias
against him.

of the debt aforesaid by virtue of the said recognizance, because they say that one *Richard Jackson*, long before the day of suing out the said writ, and continually after was, and yet is tenant of a dwelling-house, with the appurtenances, in the parish of *St. Mary, Aldermanbury*, commonly called by the name of the *Axe Inn*, of which said dwelling house the said

Abridg. 626. (I) pl. 2. *Preston v. Holmes*. S. C. Sty. 148, 149. So where one devises land to his heir, charged with a rent issuing out of it, or with the payment of a sum of money, still the heir takes by descent. Com. Rep. 72. *Clarke v. Smith*. S. C. 1 Salk. 241. 1 Lutw. 793. 797. S. P. 1 Ld. Raym. 728. *Emerson v. Inchbird*. 2 Atk. 293. *Plunkett v. Penson*. So where on *riens per descent* pleaded, it appeared that the ancestor devised the lands to the heir for payment of debts, it was adjudged that the heir was in by descent, for the tenure is not altered. 2 Str. 1270. *Allan v. Heber*. S. C. 1 Black. Rep. 22. [i] But where a different estate is devised than would descend to the heir, the disposition by the will shall prevail; as where the estate is devised to the heir in tail. Plow. 545. So where a man, having issue two daughters who are his heirs, devises lands to them and their heirs, they take under the will, for by law they would take as coparceners, but by the will they have it as joint-tenants. Cro. Eliz. 431. *Anon.* Bacon's Maxims, Reg. n. 21. See *Reading v. Royston*, 1 Salk. 242. Comyns, 123. 2 Ld. Raym. 829. But since the statute 3 W. & M. c. 14. such a devise is fraudulent against creditors by specialty, and therefore an action may be brought against the devisee as heir and devisee. An advowson in fee in gross is assets for payment of debts. Co. Litt. 374. b. Bro. *Assets per Descent*. 421. Sir W. Jones, 23, 24. 2 Str. 879.

Robinson v. Tonge. S. C. 3 Bro. P. C. 556. 3 P. Will. 401. 3 Vin. Abr. 145. Mss. case. 3 Atk. 464, 465. *Westfaling v. Westfaling*. So if a rent in fee, issuing out of the heir's land, descend to him, it is assets, though the rent is extinct, for it has continuance for this purpose. Co. Litt. 374. b. So if there be a mortgage *for years*, the reversion in fee in the mortgagor is legal assets, and the bond creditor may have judgment against the heir, with a *cesset executio* until the reversion comes into possession; but where it is a mortgage *in fee*, the equity of redemption is not legal assets, and the heir may plead *riens per descent* to an action brought against him on the bond of the mortgagor. 2 Atk. 294. *Plunkett v. Penson*; it is however assets in equity, and the creditor may have relief there. 2 Vern. 61. *Solley v. Gower*. But a *copyhold* which descends in fee is not assets, because in notion of law it is an estate only at will, and though custom has made it an estate of inheritance, yet the tenure is *ad voluntatem domini*. 4 Rep. 22. a. So at the common law an estate to a man and his heirs *pur autre vie* is not assets in the hands of the heir, for he does not properly take the estate by descent, but as special occupant. Co. Litt. 374. b. 10 Rep. 98. a. *Seymour's case*. But by the statute of frauds, 29 Car. 2. c. 3. s. 12. an estate *pur autre vie*, which comes to the heir as special occupant, is made assets by descent, as in case of lands

[i] For other authorities to the same point, see Hargrave and Butler's Co. Litt. 12. b. note (63.)

Robert Yarway deceased, in the said writ named, was seised in his demesne as of fee, on the said 16th day of *August*, in the 12th year of the reign of our lord *Charles* the 2d, now king of *England*, &c. and that no writ of *scire facias* issued out of

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in fee simple, and devisable by a will in writing signed by the devisor, and attested in his presence by three or more witnesses. [k] A devise of such an estate is held to be within the statute of fraudulent devises, and void against specialty creditors, and the estate is liable to contribute according to its gross value. 3 Atk. 465. *Westfaling v. Westfaling*. So lands which descend in tail are not assets, for it must be a fee simple. 1 Roll. Abr. 269. (B.) It is laid down as a general rule, that a reversion expectant on an estate tail is not assets, for it is in the power of the tenant in tail to bar it at his pleasure. 1 Roll. Abr. 269. (A.) pl. 2. 6 Rep. 42. *Mildmay's case*. Ibid. 58. b. *Bredimau's case*. Carth. 129. *Kellow v. Rowden*. As where A. seised in fee limits the estate to himself for life, remainder to another in tail, reversion to himself in fee, and dies indebted by bond, the reversion in fee is not assets in the heir, during the continuance of the estate tail, and he may plead *riens per descent*. Carth. 129. 2 Mod. 50. *Osbaston v. Stanhope*. 9 Mod. 176. arg. though in Lill. Ent. 112. there is a plea of *riens per descent* except a reversion expectant on an estate tail; but it seems to be a bad plea. 2 Mod. 50. So where D. being seised in fee, in consideration of a marriage to be had between him and S., and of a marriage portion, settled his estate to the use of himself and the said S. for their lives; and after the death of the survivor, to the use of the heirs of the body of the said S. by the

said D. to be begotten, with reversion to himself in fee: S. died leaving E., an only child, a daughter; and D. took another wife, by whom he had also an only child, a daughter, A., and died: upon whose death, E., his daughter, was seised of the said estate in tail, by virtue of the said settlement, and afterwards died without issue, leaving A., her half sister, surviving her. It was adjudged, that though the reversion in fee descended upon E. and A., the two daughters of D., on his death, yet they were not *actually seised* of that reversion during the continuance of the estate tail; but the same was expectant thereon. And as whoever takes by descent, must take as heir to him who was last actually seised, therefore A. took the reversion wholly as heir to her father; and Co. Lit. 14. 15. and *Kellow v. Rowden*, Carth. 126. S. C. 1 Strow. 244. were held to be good authorities in point; 2 Wils. 45. *Jenkins v. Pritchard*: therefore, it seems to follow, that the reversion in fee was not assets during the continuance of the estate-tail. The judgment of the court, as reported in Wilson, is contrary to the account of it were given: but it seems evident from the facts of the case, as stated by him, which are correct, that he has mistaken the judgment. It is impossible that the court, upon those facts, could have given the judgment which he reports them to have given. The judgment must have been as it is here stated. [l] But when the reversion vests in possession in the heir, it is assets, and he

[k] See ante, vol. i. p. 260 a. note [f]

[l] The mistake in *Jenkins v. Pritchard* is noticed and corrected in the

same manner by Lord *Alvanley* C. J., in *Doe v. Hutton*, 3 Bos. & Pull. 658.

JEFFRESON the court here directed to the sheriffs of *London*, against the
v. MORTON terre-tenants of him the said *Robert*; and this they are ready
 and others. to verify; wherefore inasmuch as no writ of *scire facias* issued
 out of the court here directed to the sheriffs of *London*, they

is chargeable in respect of it with the payment of the bond. Thus, in the case of *Kellow v. Rowden* already mentioned, the reversion in fee in B. expectant on the estate tail which he was seised of was not assets; but when the estate tail was extinct, and the reversion vested in possession in the heir of the obligor, it became assets and liable to the debt. So where T. D. being seised in fee, on his marriage settled his estate on himself for life, remainder to his first and other sons in tail, reversion to himself in fee, and died indebted by bond, leaving a son who devised the reversion to C. in fee, and afterwards died without issue; *Lord Hardwicke* held that the reversion, having come into possession in C. the devisee, was assets to satisfy the bond, the devise being fraudulent against the creditor by the statute 3 W. & M. c. 14. and he thought that an action of debt might be maintained against the heir and such devisee. If the son had suffered a recovery, the creditor was without remedy, but if he had levied a fine only, it would have barred the estate tail, and let in the reversion, which would be liable to the specialty debts of T. D. 2 Atk. 204. *Kinaston v. Clark*. In this last case, and also in *Kellow v. Rowden*, it appears that the bond was entered into by him who had been once seised in fee in possession, and afterwards created the limitations of the estate, and was the person who died last seised of the fee, and therefore the heir, in claiming the reversion on the determination of the particular limitations, was bound to derive his title to it from the obligor; but in *Smith v. Parker*, 2 Black. Rep. 1230.

the court of C. B. went a step further, and held that where an intermediate tenant for life, remainder to his first and other sons in tail, being in possession of his estate for life, and having the reversion in fee in him subject to intermediate estates for life, with contingent limitations to the first and other sons of each tenant for life in tail, entered into a bond and died without issue, the reversion was assets in the heir, when it vested in him in possession to satisfy the bond. The case was, that A. seised of lands in fee devised them to B. for life, remainder to C. for life, remainder to his first and other sons in tail, remainder to D. for life, remainder to his first and other sons in tail, remainder to E. for life, and his first and other sons in tail, remainder to the testator's right heirs; B. died, C. entered, and being heir at law of A. the testator, and having the reversion in fee in him expectant on the several estates in himself, and D. and E. entered into a bond and died without issue, and afterwards D. and E. died without issue, so that the contingent uses never happened, and the reversion vested in possession in F., who was the heir at law of the testator and of the obligor; and on debt against F. upon this bond as heir of C. the obligor, and *riens per descent* pleaded, the court was of opinion that the reversion being vested in possession in F. was assets and chargeable with the bond. The authority of this case was questioned by Lord *Thurlow* in *The Marchioness of Tweedale v. Earl of Coventry*, 1 Brown. C. C. 240., where H. devised lands to R. for life, remainder over in tail, remainder to his own right heirs, and died. R. the tenant for life entered,

the said *John, Humphry, Thomas, and Alexander*, pray judgment if they ought to be compelled to answer (10) to the said writ in form aforesaid returned, &c.

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Plaintiff prays a writ of *scire facias* against R.J.

and being the heir of H. had the reversion in fee expectant on the estate tail, and died indebted by bond and other specialties, and the remainder in tail being extinct, the reversion in fee vested in the heir of R. in possession, and one of the questions was whether the reversion was assets in the heir of R. to satisfy his specialty debts. Lord *Thurlow* did not give any judgment upon that question, but expressed himself not satisfied with the decision in *Smith v. Parker*. It appears from Mr. Justice *Blackstone's* report that no cases were cited, and therefore perhaps the court was not aware of the case of *Gifford v. Barber*, 4 Vin. Abr. 452, 453. MSS. Rep. S. C. cited in *Cunningham v. Moody*, 1 Ves. 174, 175., in which Lord *Hardwicke* seems to be of a contrary opinion. There D. C. being seised in fee, settled the estate on himself for life, remainder to G. C. for life, remainder to his first and other sons in tail, with several remainders over in the same manner in strict settlement, reversion to himself in fee, and died; G. C. entered, and being heir at law of D. C. was seised for life together with the reversion in fee expectant, and confessed a judgment, and died without issue; the other persons in remainder died without issue, and the reversion coming into possession in a person who was the heir both of D. C. and G. C. the question was, whether it was liable to the judgment confessed by G. C. Lord *Hardwicke* was of opinion it was, because, being the estate of inheritance of G. C. he might grant, incur or lease it for any number of years, or charge it by a judgment or statute:

that in *Kellow v. Rowden* the question was, whether the plaintiff had properly charged the defendant as immediate heir to his father, or whether he ought not to have charged him as heir to the nephew, and stated specially the intermediate descent; but it was not doubted that the reversion in fee, which took place in the second son in possession, was vested in the first son, and that he might have charged it with a statute, judgment or recognizance, or might have made a lease for years of it, and it would have come to the brother subject to the charges or lease—*That the stating of that proved the difference*, and that it would not be liable to the bond of G. C. as assets by descent, because that cannot be where there is an intermediate estate, but must be where the heir takes as immediate heir to the ancestor that entered into the bond. That on a judgment, the terre-tenant of the land which was in the person who confessed the judgment is chargeable, but he is not so by his bond, unless the land came as assets by descent to the very heir of the obligor. So in *Hargrave's Co.* Litt. 11. b. n. (3.) there is a note of Lord *Hale* to this effect, (*viz.*) "grandfather, father, and son; grandfather dies, the father is bound in an obligation or warranty and dies before entry. Held that the son is not liable, because he shall make himself heir to the grandfather;" and 24 Edw. 3. is cited; and though the page is not mentioned, it is probably 24 Edw. 3. 47. abridged Bro. Assets per Descent 19. "By *Thorpe*, the heir shall not render in value for the warranty of his ancestor, if the assets do not come from the same ancestor who

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of our lord the king to be directed to the sheriffs of *London* to make known to the said *Richard Jackson* to be before our said lord the now king in his said chancery, to shew if any thing, &c. why he, the said *John Jeffreson*, the now plaintiff,

made the deed ; as if the grandfather be seised, and the father makes a warranty to J. N. of other land and die, and afterwards the grandfather die seised ; the son shall not render this land in value, for the father was not seised thereof, and the son has it as immediate heir to the grandfather ; and where there is grandfather, father and son, *the grandfather* lets the land for life, and the father warrants other land, the grandfather dies, and the father is seised of the reversion and dies, the tenant for life dies, the heir shall not render in value for this land, for the father was not seised of the land ;" but *Broke* adds a *quære inde*, " for a reversion is good assets as it is said elsewhere ;" but by *Welby*, " if the *father* had been seised and let for life, and died in the life time of the tenant for life, it is good assets to bind the heir." *Broke* has abridged the same case in title *Recovery in Value 13.*, without any *quære* ; and it is also abridged in *Fitz. Recovery in Value 14.*, who adds, "*quod nota.*" In *Rooke v. Cleland*, 1 Lutw. 503. S. C. 1 Ld. Raym. 53. a bond was made by a person who was seised only of a reversion in fee expectant on an estate for life, and it was held to be assets in the hands of the heir during the continuance of the estate for life. That case was this ; husband and wife seised in fee in right of the wife, had issue a son and a daughter, the wife died, and the husband on her death was tenant for life by the curtesy, reversion to his son in fee ; the son entered into a bond, and died, leaving a daughter, who died without issue, leaving her aunt her heir ; and in an action on the bond against the aunt in the life-time of the tenant

by the curtesy, the court was of opinion that the reversion was assets, and gave judgment for the plaintiff. This does not seem to differ from the other cases on this subject, for the assets descended immediately on the defendant as heir from the same person who made the deed, and there is no intermediate estate here as there was in *Giffard v. Barber*, and under those circumstances its being a reversion seems to make no difference. Therefore the case of *Smith v. Parker* may perhaps be found to be of doubtful authority ; and since the writing of these observations, the authority of it has been denied in *Doe v. Hutton*, 3 Bos. & Pull. 643. 648. 651. The editor has compared the case in the report with the paper book which was delivered to one of the learned judges who then sat upon the bench, and it appears by it, and also by a short note taken by him on the paper book, that the case is correctly stated by Mr. Justice *Blackstone*, and that the court was of opinion the reversion was assets.

(5) These words, " or at any time after," are held essential by Lord *Hale*, (note (a) F. N. B. 595.) who cites in support of his opinion 46 Edw. 3. 29. *Fitz. Brief 605.*, where it is said, " there is another fault in the writ, for it only mentions the warning of the tenants of the conusor's lands generally, which may be as well *before* as *after* the recognizance, and no land is liable to execution *but such as the conusor had on the day of the recognizance or after.*" S. P. Bro. Recognizance 4. 9.

Any judge of the courts at *Westminster* may take a recognizance at common law, in term or out of term, and in any

ought not to have execution against him of the debt aforesaid, to be levied of the said dwelling house, with the appurtenances whereof he is above supposed to be tenant, together with the said tenements, with the appurtenances whereof the said John,

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county in *England*. Bro. Recognizance 20. Vaugh. 102, 103. 2 Ld. Raym. 1141. 11 Mod. 53. So the lord chancellor or keeper may take such recognizance, and award execution. And although enrolment is necessary to the validity of a recognizance, yet it bound the lands at the common law *from the time of the caption*; for it is the acknowledgment that gives a recognizance its force as a record, and the enrolment is for safe custody and the notifying of it to others. Hob. 195, 196. *Hall v. Winckfield*. 1 Vent. 360. in *Berry v. Bowes*. Dy. 306. b. 1 Roll. Abr. 892. pl. 11. 2 Roll. Abr. 393. But now by the statute of frauds, 29 Car. 2. c. 3. s. 18. it is enacted, "that the day of the month and year of the enrolment of recognizances shall be set down in the margin of the roll where the recognizances are enrolled; and no recognizance shall bind any lands, tenements, or hereditaments in the hands of any purchaser *bona fide*, and for valuable consideration, *but from the time of such enrolment*." There is no precise time fixed for the enrolment of recognizances at common law; but it seems necessary they should be enrolled within six months by the equity of the statute 27 Eliz. c. 4. s. 7 & 8, which requires that recognizances in the nature of statutes merchant and statutes staple taken according to the statute 23 H. 8. c. 6. should be entered within six months next after their being acknowledged; and that if the conusees shall not deliver them to the clerk of recognizances within four months next after their being acknowledged in order to be entered, they shall be void against purchasers for valuable consideration.

The provision in the statute of frauds has in general the effect of occasioning a speedy enrolment of recognizances; however, if the conusees neglect to enrol them within the time limited, they are considered in equity in the nature of debts by bond only. 1 P. Will. 334. *Bothomly v. Lord Fairfax*. So with respect to judgments; by the common law a judgment related to the first day of the term, though signed after; and the plaintiff was entitled to have execution of the lands which the defendant was seised of on the first day of the term, or after, although he had aliened them *bona fide* before execution, or they were extended upon a statute acknowledged after. 30 Edw. 3. 24. 1 Roll. Abr. 892. pl. 12, 13, 14, 15, 16. 2 Inst. 395. Bro. Elegit. 17. 19. 1 Brownl. 38. 8 Mod. 310. *Graves v. King*. But now by statute 29 Car. 2. c. 3. s. 13, 14, & 15. reciting, "that it had been found mischievous that judgments in the king's courts at *Westminster* did many times relate to the first day of the term whereof they were entered, or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged or suffered and signed in the vacation time after the said term, whereby many times purchasers found themselves aggrieved;" it is enacted, "that any judge or officer of any of his majesty's courts of *Westminster* that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing upon the paper book, docket, or record which he shall sign; which day of

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Writ issued.

Humphry, Thomas, Richard, and Alexander are above respectively returned tenants, and it is (11) granted to him, &c. wherefore the sheriffs of *London* aforesaid are commanded, that by good, &c. they make known to the said *Richard Jackson*, that he be before our said lord the now king in his said

the month and year shall be also entered upon the margent of the roll of the record where the said judgment shall be entered, and such judgments, as against purchasers *bona fide* for valuable consideration of lands, tenements, or hereditaments, to be charged thereby, *shall in consideration of law, be judgments only from such time as they shall be so signed*, and shall not relate to the first day of the term whereof they are entered, or the day of the return of the original, or filing the bail." And by statute 4 & 5 W. & M. c. 20. reciting that great mischiefs and damages happen and come as well to persons in their life times, but more often to their heirs, executors, and administrators, and also to purchasers and mortgagees, by judgments entered upon record in the courts at *Westminster* against the persons defendants, by reason of the difficulty there is in finding out such judgments, it enacts that all judgments shall be doggeted in the manner therein mentioned, and by section 3. it is further enacted, "that no judgment not doggeted and entered in the manner prescribed by the act, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors, testators, or intestates estates." It has been held that, in the administration of the ancestor's or testator's estate, a judgment not doggeted pursuant to this statute, is to be considered only as a simple contract debt, and on the issue of *plene administravit* an executor may give in evidence that he has applied all the assets in payment of bond or simple

contract debts before the commencement of the action. 6 Term Rep. 384. *Hickey v. Hayter*. And if an heir or executor should plead to an action on a bond or simple contract an outstanding judgment, the plaintiff may reply that it was not doggeted and entered according to the provisions of the statute. 1 Bos. & Pull. 307. *Steel v. Rork*.

(6) The words "*said recovery*" were used in a *scire facias* on a recognizance, instead of "*said recognizance*," and on demurrer they were held to be surplusage, and the demurrer over-ruled, 3 Mod. 251. *Ayres v. Huntingdon*.

(7) In 2 Salk. 598. *Panton v. Hall*, the return of the sheriff was held ill, because it was that A., B., and C. were tenants of lands, instead of tenants of *all* the lands in his bailiwick; but the present return seems proper without the word "*all*," because it is afterwards averred that there were no other tenants of the conusor in his bailiwick whom he could warn.

(8) As the *scire facias* is to warn the heir and tenants, regularly the return ought to take notice of him, as that he is dead, or there is no heir within the sheriff's bailiwick, or that he was warned. We have already seen that the heir is chargeable only as tenant; if therefore the heir be seised of any part of his ancestor's lands, and the conusee omit to join him in the *scire facias* with the other tenants; or if he be joined, and the sheriff take no notice of him in his return to the *scire facias*; the tenants may take advantage of the omission in the manner mentioned hereafter in note (10.), but it is aided after verdict

chancery, on the octave of St. Hilary next coming where-soever, &c. to show in form aforesaid, and that they have there the names of those by whom, &c. the same day is given as well to the said *John Jeffreson*, the now plaintiff, as to the

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by the statute of jeofails. Cro. Car. 295. 312. *Eyres v. Taunton*. S. C. Sir W. Jones, 319. See the form of the return. Lil. Ent. 385.

(9) By *tenants*, tenentes, generally is meant the owners of the fee-simple, and by occupiers, those who come in under them; that *tenant* is so taken appears by the writ *de ouriâ claudendâ*, which is a writ of right and lies only for a tenant of the fee. F. N. B. 297. and therefore a prescription is well pleaded by alleging that the *tenants* of such a close have from time immemorial been accustomed to repair, &c. 1 Salk. 336. *Star v. Rookesby*. S. P. Cro. Jac. 665, 666. *Holbach v. Warner*. Palm. 331. 2 Roll. Rep. 288. S. C.

(10) The reason of this plea seems to be, because every tenant of the land is intitled to have contribution, that is, all the lands of the conusor, or defendant to the judgment, in the hands of the several purchasers, must be extended and equally charged; therefore unless *all* the tenants be warned, the others are not obliged to answer; and if the tenant does not take advantage of the omission in the first instance by a plea of this sort, which he may do notwithstanding the sheriff's return, he loses the benefit of contribution, or of relief by an *auditi querelâ*, in case execution is taken out against his land alone, Cro. Jac. 506. *Michel v. Croft*.; Moor. 525. *Clerk v. Hardwick*; for he cannot plead it after a plea in bar. Sir W. Jones, 319. *Eyres v. Cowly*. Post, 210 [e] 210. [f] note. If a *scire facias* be against the *heir* alone, it is said that he is not intitled to receive

contribution from a purchaser; which seems rather unaccountable, as the heir is chargeable only as tenant of the land; but if there be several heirs, such as parceners, heirs in gavelkind, or borough english, and one only be charged, he is intitled to contribution from the other heirs, and therefore may plead this plea. 3 Rep. 12, 13. Sir W. Harbert's case. This plea must not be pleaded in abatement when the terre-tenant omitted is tenant of lands in another county, because the sheriff has done his duty in summoning the terre-tenants in his county; and therefore the plaintiff must sue out a new writ directed to the sheriff of the other county where the lands, &c. lie, and the plea must not conclude with praying "*that the writ may be quashed*," but "*if the defendant ought to be compelled to answer*," as in this entry; and it ought not to allege that they are *not named*, or *not returned*. But where the terre-tenants not returned are of lands in the *same* county, the precedents are both ways: though even if it be pleaded in the form of a plea in abatement, it must not be understood that the court can give judgment to abate the writ, because there is no defect in the writ, but only to stay, till the other terre-tenant is brought in: [m] but the better form in that case is to pray judgment, "*if the defendant ought to be compelled to answer*." 2 Vent. 104, 105. *Prynne v. Sloughter*. 2 Salk. 601. *Adams v. Savage*. S. C. 2 Ld. Raym. 1253. 6 Mod. 199, 226. Moor. 524. *Clerk v. Hardwick*. Ibid. 571. pl. 783. Ibid. 429. *Gresham's case*. Cro. Eliz. 506. S. C.

[m] See post 210. [g] note.

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Profert of letters
testamentary.

Plea by R. D.
and A. O.

said *John, Humphry, Thomas, Richard, and Alexander*, there, &c. At which day before our said lord the now king in his said chancery here, to wit, at *Westminster* aforesaid, come as well the said *John Jeffreson* the now plaintiff, as the said *John, Humphry, Thomas, Richard, and Alexander*, by their said attornies, and the sheriffs of *London* aforesaid, to wit, F.C. and J. F. now here return that, by E. M. and J. C. good and lawful men of their bailiwick, they had made known to the said *Richard Jackson*, tenant of the said dwelling-house with the appurtenances in their bailiwick, that he should be before our said lord the king in his chancery here on this day, to shew according to the exigency of the said writ, as by the said writ they were commanded. And the said *Richard Jackson* by *William Longvill* his attorney likewise comes, and thereupon he the said *John Jeffreson* the now plaintiff brings (12) here into court the letters testamentary of the said *John Jeffreson* the testator, by which it sufficiently appears to the court here, that he the said *John Jeffreson* the now plaintiff is executor of the said will, and has the administration thereof, and he prays, that as well the said *John, Humphry, Thomas, Richard, and Alexander*, as the said *Richard Jackson*, may answer to the said several writs aforesaid sued out against them respectively, &c. Whereupon it is said by the court here to the said *Richard Jackson*, that he answer to the said writ sued out against him; and it is likewise said by the court here to the said *John, Humphry, Thomas, Richard, and Alexander*, that they further answer to the writs aforesaid sued out against them on peril, &c.

And the said *Richard Dawson* and *Alexander Orpwood* say, that the said *John Jeffreson* executor of the last will and testament of the said *John Jeffreson* deceased in the said writ named ought not to have execution of the said dwelling houses with the appurtenances mentioned in the return of the writ of *scire facias* against them the said *Richard* and *Alexander* for the debt aforesaid by virtue of the said recog-

Co. Ent. 624. a. Ow. 134. *Kempe v. Laurence*. This plea is referred to as being a good precedent, 2 Salk. 601.

(11) Hence it appears that upon such plea the plaintiff may take a new writ against other terre-tenants; and so is Moor. 525. *Clerk v. Hardwick*.

(12) As this writ is brought by an executor, it seems necessary to make a profert of the letters testamentary in the middle or at the end of it, but usually at the end, as in this case. Carth. 69. *Bosworth v. Ridgley*. S. C. 1 Show. 60. Lill. Ent. 386.

nizance; because they say, that before the day of the acknowledgment of the debt aforesaid by the said *Robert Yarway* in in the said writ of *scire facias* named, one *Thomas Smith* was seised of the said dwelling houses with the appurtenances in his demesne as of fee; and being so thereof seised afterwards, to wit, on the 20th day of *June* in the year of our lord 1666, (13) enfeoffed the said *Robert Yarway*, in the said writ above-named, and one *Thomas Yarway*, of the said dwelling houses with the appurtenances, to have and to hold to the said *Robert Yarway* and *Thomas Yarway* their heirs and assigns, to the use of them the said *Robert* and *Thomas* their heirs and assigns for ever; by virtue of which said feoffment, they the said *Robert Yarway* and *Thomas Yarway* were seized of the said dwelling houses with the appurtenances in their demesne as of fee; and being so thereof seised, he the said *Robert Yarway* afterwards, to wit on the 1st day of *August* in the 14th year of the reign of our lord *Charles* the 2d now king of *England*, &c. at the parish of *St. Clement Danes* aforesaid, in the county aforesaid died; (14) *without this*, that the said *Robert Yarway* at the time of the acknowledgment of the debt aforesaid to the said *John Jeffreson* deceased in the writ of *scire facias* above-mentioned, was sole seised of the said dwelling houses with the appurtenances in his demesne as of fee, in manner and form as by the return of the writ of *scire facias* aforesaid is alleged. And this they are ready to verify; wherefore they pray judgment if the said *John Jeffreson* the now plaintiff, ought to have his execution against them for the said debt to be levied of the said dwelling houses whereof they are above respectively returned tenants.

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That T. S. before the recognizance was seised of the houses, whereof defendants are returned tenants in fee, and enfeoffed the said R. Y. and T. Y. to hold to them and their heirs.

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R. Y. died, note, the plea does not state that T. Y. survived him, as it ought to have done.

And traverse that R. Y. was sole seised in fee.

(13) A feoffment is never pleaded by deed, but this is the constant form of pleading it, and therefore there is no need of a profert. See 1 Saund. 9. a. note.

(14) It is not expressly alleged in the writ of *scire facias* that R. Y. was sole seised in fee, but a sole seisin seems necessarily implied from the words "which were of the said R. at the time of the recognizance of the said debt or ever after," for the defendants would not otherwise be liable: and it is a rule of pleading, that whatever is necessarily understood, intended and implied, is

traversable as much as if it were expressly alleged. As where in replevin the defendant said that A. was seised in fee of the place in which, &c. and by his command he took the cattle damage feasant; the plaintiff pleaded that he was seised in fee of a third part thereof, and traversed that A. was sole seised. The traverse was held proper, for by pleading that A. was seised in fee, it must necessarily be understood that he was sole seised, and therefore the plaintiff not only might but was bound to traverse the sole seisin. 2 Salk. 629. *Gilbert v. Parker*. S. C. 6 Mod. 158.

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Plea by J. M.
H.W. and T.R.

That before the
recognizance R.
H. was seised
of the dwelling
houses whereof
defendants are
returned tenants
in fee,
and being so
seised by inden-
tures of lease
and release,
conveyed the
premises to
W. W. in fee
in trust for the
said R. Y.

Lease and re-
lease set out.

And the said *John Morton, Humphry Wiggan, and Thomas Richardson* say, that the said *John Jeffreson* executor of the last will and testament of the said *John Jeffreson* deceased in the said writ named ought not to have execution of the said dwelling houses situate in *Gray's Inn Lane* with the appurtenances, in the return of the said writ of *scire facias* mentioned, against them the said *John Morton, Humphry Wiggan, and Thomas* for the debt aforesaid by virtue of the said recognizance, because they say that, long before the day of the said recognizance by the said *Robert Yarway* in the said writ of *scire facias* named, one *Ralph Hensby*, esq. was seised of the said dwelling houses with the appurtenances in his demesne as of fee, and the said *Ralph* being so thereof seised afterwards, to wit, on the 28th day of *May*, in the year of our lord 1657, at the parish of *St. Andrew* in *Holborn* in the county of *Middlesex*, by a certain indenture of bargain and sale made between the said *Ralph* of the one part, and one *William Warne* of the other part, (one part of which said indenture sealed with the seal of him the said *Ralph*, they the said *John Morton, Humphry, and Thomas Richardson* bring here into court, the date whereof is the same day and year aforesaid) for a certain sum of money in the said indenture mentioned, he the said *Ralph Hensby* bargained and sold to the said *William Warne* the said dwelling houses with the appurtenances, to have and to hold the said tenements with the appurtenances to the said *William Warne* his executors, administrators and assigns, from the day next before the date of the said indenture unto the full end and term of one year from thence next following and fully to be complete and ended; by virtue of which said bargain and sale the (15) said *William Warne* was possessed of the said tenements with the appurtenances; and being so thereof possessed, and the said *Ralph* being so seised of the reversion of the said dwelling houses, afterwards and before the said day of the acknowledgment of the debt in the writ mentioned, to wit, on the 29th day of *May* in the said year of our lord 1657, at the parish aforesaid, in the county aforesaid, by his certain writing of release then and there made between the said *Ralph Hensby* of the one part, and the said *William Warne*

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(15) The form of pleading a lease for a year now used differs from the above only in this, that after the words "by virtue of which said bargain and sale,"

are added the following, "and by force of the statute made for transferring uses into possession."

of the other part, (one part whereof sealed with the seal of him the said *Ralph*, they the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson* bring here into court, the date whereof is the same day and year aforesaid,) he the said *Ralph Hensby* granted, remised, released, and quit claimed unto the said *William Warne* his heirs and assigns, the aforesaid dwelling houses with the appurtenances, then being in the possession of the said *William Warne*, to have and to hold the aforesaid dwelling houses to the said *William Warne* his heirs and assigns, to the use of him the said *William Warne* his heirs and assigns for ever, in trust for the said *Robert Yarway* and his heirs; by virtue of which said release, (16) he the said *William Warne* was seised of the said dwelling houses with the appurtenances in his demesne as of fee, in trust (17) for

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(16) So in the present form of pleading a release, the same words, "and also by force of the statute for transferring uses into possession," are added after the words, "by virtue of which said release."

(17) At the common law if one man was seised of the legal estate to the use of, or according to the modern phrase, in trust for another, who had acknowledged a recognizance, or against whom a judgment had been obtained, these lands were not liable to execution upon the judgment or recognizance of the *cestui que trust*. Co. Litt. 374. b. But by the statute of frauds 29 Car. 2. c. 3. s. 10. it is enacted, "that it shall be lawful for any sheriff or other officer to whom any writ or præcept is directed at the suit of any person, of, for and upon any judgment, statute or recognizance, to do, make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons are in any manner or wise seised or possessed in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the

"said party against whom execution was sued had been seised of such lands, &c. of such estate as they are seised of in trust for him at the time of the said execution sued; which lands, &c. by virtue and force of such execution shall accordingly be held and enjoyed freed and discharged from all encumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; and if any *cestui que trust* shall die, leaving a trust in fee-simple to descend to his heir, then and in every such case, such trust shall be deemed and taken and is hereby declared to be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestor for and by reason of such assets as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended." The words in the act, "at the time of the said execution sued," are held to refer to the seisin of the trustee; and therefore if he has conveyed the lands by the direction of *cestui que trust* before execution, though seised in trust at the time of the judg-

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W. W. afterwards conveyed the premises to defendants in fee.

the said *Robert Yarway* and his heirs. And the said *William Warne* being so thereof seised, he the said *William Warne* afterwards to wit, on the 28th day of *November* in the 14th year of the reign of our lord *Charles* now king of *England*, &c. at the parish of *St. Andrew Holborn* aforesaid in the county aforesaid, by a certain indenture of bargain and sale made between the said *Robert Yarway* and the said *William Warne*,

ment, the lands cannot be taken in execution. As where a judgment was obtained against a *cestui que trust*, who afterwards borrowed a sum of money, and the trustee by his direction mortgaged the estate to the lender, and an *elegit* being taken out upon the judgment, and a moiety of the estate mortgaged, extended and delivered to the plaintiff, he brought an ejectment, and the question was if he had any title by virtue of this statute; and after argument it was determined by Mr. Justice *Tracy* that the execution was not good; and Sir *Edward Northey* said, that ever since the act such construction had been thought agreeable to the statute, though he did not know it had ever been judicially determined; and a case was mentioned by Mr. Justice *Tracy* from Mr. Serjt. *Cheshire's* notes, where this

opinion seemed to have been allowed by Lord *Trevor*, and was not contradicted by the court. Com. Rep. 226. *Hunt v. Coles*. The same point is recognized by Chief Baron *Comyns*, Dig. Execution (C 14.). It is held that if a man be *cestui que trust* of a term, it is not assets within the statute, for it extends only to a trust of land in fee. 2 Vern. 248. *King v. Ballett*. [m]

With respect to what shall be said to be an use executed by the statute of 37 H. 8. c. 10. of uses, or a trust estate now not executed, it is held, that where an use is limited upon an use, it is not executed, but the legal estate is vested in him to whom the first use is limited. Dy. 155. *Tyrrel's* case. As where an estate is conveyed to another in the manner mentioned above in this entry, viz. to W. and his heirs to the use.

[m] It is held that an equity of redemption cannot be taken in execution under this statute: whether it be of a freehold estate; 2 Atk. 290. *Plunket v. Penon*; or of a term of years, 1 Ves. jun. 431. *Lyster v. Dolland*. 8 East, 467. *Scott v. Scholey*; in which last case Lord *Ellenborough* C. J. seems to have been of opinion that a trust estate for years is not within the statute. In giving judgment in *Scott v. Scholey*, he said, "The very silence of the statute, which, while it expressly introduces a new provision in respect of lands and tenements held in trust for the person against whom an execution is sued, says nothing as to trusts of chattel in-

terests, affords a strong argument that those interests were meant to continue in the same situation and plight, in respect of executions, in which both freehold and leasehold trust interests equally stood before the passing of that statute." 8 East, 486. And see 4 B. & A. 684. *Doe v. Greenhill*, in which it was determined that even if a clear trust term of years be within the statute, yet it must be held simply and solely in trust for the defendant; and as in that case it was held for the defendant and another, the statute was considered not to apply; and doubtless the same rule would prevail as to trusts of freehold.

and one *William Sallows*, and one *Thomas Yarway* of the one part, and them the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson* of the other part, (one part of which said indenture sealed with the seals of them the said *Robert Yar-* JEFFRESON
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of him and his heirs, in trust for, or to the use of R. and his heirs, the use is not executed in R. but in W. and the legal estate is vested in him as trustee. *Cas. Temp. Talb.* 164. *Robinson v. Comyns*. *Ibid.* 138, 139. *Attorney-General v. Scot.* 2 P. Will. 146. *Whetstone v. Sts. Bury*. So where E. made a settlement to the use of himself and his heirs until his then intended marriage, and afterwards to the use of his wife for life, and after her death to the use of trustees and their heirs during the life of E. upon trust to permit him to take the profits, remainder to the first and other sons of the marriage, &c. remainder to the use of the heirs of the body of E.; it was adjudged that E. took only a trust estate for life, for the use to him could not execute upon the use which was limited to the trustees for his life, and consequently the legal estate for his life was executed in them by the statute of uses, and the limitation to the heirs of the body of E. operated as words of purchase, and created a contingent remainder. *Carth.* 372. *Tippin v. Cosin*. S. C. *Comber.* 312, 313. 1 *Ld. Raym.* 33. 4 *Mod.* 380. [n] So where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them,

and the grantee or devisee has only a trust estate. See 3 *Bos. & Pull.* 178, 179. *Kenrick v. Beauclerk.* 2 T. R. 444. *Silvester v. Wilson.* [o] As where lands were devised to trustees and their heirs in trust for A. a married woman and her heirs, and that the trustees should from time to time pay the rents and profits to A. or to such person as she by any writing under her hand, as well during coverture, as being sole, should appoint, without the intermeddling of her husband, who he willed should have no benefit or disposal thereof; and as to the inheritance of the premises in trust for such person and for such estates as A. by her will or other writing under her hand should appoint, and for want of such appointment in trust for her and her heirs. The question was whether this was an use executed by the statute, or a bare trust for the wife; and the court held it to be a trust only, and not an use executed by the statute. 1 *Vern.* 415. *Nevil v. Saunders*. So where lands were devised to trustees and their heirs in trust to pay out of the rents and profits several legacies and annuities, and to pay all there-sidue of the rents and profits to C. a married woman during her life for her separate use, or as she should direct, and after her death the trustees to stand seised to the use of the heirs of her body with remainders over; it was held by Lord King, that the use was executed in the trustees during the life

[n] See also 7 T. R. 342. *Venables v. Morris*. *Ibid.* 438. S. C. *Ibid.* 433. *Doe v. Hicks*. 12 *Ves.* 89. *Curtis v. Price*.

[o] See also to the same effect 6 T. R.

213. *Somerville v. Lethbridge*. 8 *East*, 248. *Keene v. Deardon*. 12 *East*, 455. *Wright v. Smith*. 4 *Taunt.* 772. *Gregory v. Henderson*

JEFFRESON way, *William Warne, William Salloway and Thomas Yarway,*
v. MORTON they said *John Morton, Humphry Wiggan, and Thomas*
 and others. *Richardson* bring here into court,) and in due manner enrolled
 in the court of chancery of our lord the king at *Westminster*

of C. who had only a trust estate in the surplus of the rents and profits for life, with a contingent remainder to the heirs of her body, and that her eldest son would take as a purchaser; for by the subsequent words, viz. "that the trustees should stand seised to the use of the heirs of the body of C.," the use was executed in the persons intitled to take by virtue thereof; and therefore there being only a trust estate in C. and an use executed in the heirs of her body, these different interests could not unite and incorporate together so as to create an estate tail by operation of law in C. And he took a difference between the principal case and that of *Broughton v. Langley* (hereafter noticed), for there it was to permit A. to receive the rents and profits for life, but in the principal case it was a trust to pay over the rents and profits to another, and therefore the estate must remain in the trustees to perform the will. 8 Vin. 262, pl. 19. MS. Rep. *Lady Jones v. Lord Say & Seal*. S. C. 1 Equ. Cas. Abr. 383, 384.; and this decree was affirmed in the house of lords. 3 Bro. C. P. 458. See 3 Bos. & Pull. 179. So where lands were devised to trustees and their heirs in trust to pay out off the rents and profits, after deducting rates, taxes, and repairs, the residue to C. S. for life, and after his decease to the use of the heirs male of the body of C. S. with remainder over: it was held by Lord *Thurlow*, that the use was executed in the trustees during the life of C. S. who had only a trust estate for life, and the remainder in tail was a legal estate, which could

not unite and incorporate together, and C. S. could not suffer a valid recovery, for in order to make a good tenant to the præcipe, there must either be a legal estate for life, and a legal remainder in tail, or an equitable estate for life, with an equitable remainder in tail. 1 Bro. C. C. 75. *Shapland v. Smith*. And again in a late case, where a devise was to trustees and their heirs upon trust, to permit a married woman to receive the rents and profits during her life for her own sole and separate use, notwithstanding her coverture, and without being in any wise subject to the debts, or control of her then or after taken husband, and her receipt alone to be a sufficient discharge, with remainder over; it was held that the legal estate was vested in the trustees; for it being the intention of the testator to secure to the wife a separate allowance, free from the control of her husband, it was essentially necessary that the trustees should take the estate with the use executed in order to effectuate that intention, otherwise the husband would be entitled to receive the profits and defeat the very object which the testator had in view. 7 Term. Rep. 652. *Harton v. Harton*. [p] And also where lands were devised to trustees and their heirs in trust, that they should, out of the rents and profits, or by sale or mortgage of the whole, or so much of the estate as should be necessary, raise a sum sufficient to pay the testator's debts and legacies, and afterwards in trust and to the use of T. B. for life, with several remainders over, the question

[p] See also 5 East, 162. *Doc v. Simpson*. 9 East, 1. *Robinson v. Grey*.

on the 6th day of *December* in the 14th year aforesaid, according to the form of the statute in such case made and provided, for a certain sum of money in the said indenture mentioned, Jefferson v. Morton and others. bargained and sold to them the said *John Morton, Humphry*

was whether the legal estate vested in the trustees; Lord *Hardwicke* was of opinion that the devise to the trustees and their heirs carried the whole fee to them, and therefore the estate for life, as well as the estates in remainder, were merely trust estates in equity; that part of the trust was to sell the whole or a sufficient part of the estate for the payment of debts and legacies, which would carry a fee by construction, though the word heirs were omitted in the devise, as in *Shaw v. Weigh*. 1 Eq. Cas. Abr. 184.; for the trustees must have a fee in the whole estate to enable them to sell, because, it being uncertain what they may sell, no purchaser could otherwise be safe; that the only doubt he had was on the case of *Lord Say & Seal v. Lady Jones*, before Lord King, and affirmed in the house of lords as to that point; but on examination that case differed in a material part; and taking together all the clauses of that will, it amounted only to a devise to trustees and their heirs during another's life, upon which a legal remainder might be properly limited. 1 Vez. 143. *Bagshaw v. Spencer*. S. C. 2 Atk. 246. 570. And it was taken for granted in *Garth v. Baldwin*, 2 Vez. 646. that a devise to trustees and their heirs in trust, to pay the rents and profits to another vested the legal estate in the trustees. For in general the distinc-

tion is, that where the limitation to trustees and their heirs is *in trust to receive the rents and profits and pay them over to A. for life, &c.* this use to A. is not executed by the statute, but the legal estate is vested in the trustees to enable them to perform the will; but where the limitation is to trustees and their heirs in trust, *to permit and suffer A. to receive* the rents and profits for his life, &c. the use is executed in A. unless it be necessary the use should be executed in the trustees to enable them to perform the trust, as in the case of *Harton v. Harton* above mentioned. [q] As where lands were devised to trustees and their heirs, *to the intent and purpose to permit A. to receive* the rents and profits for his life, and after that the trustees should stand seised to the use of the heirs of the body of A. with a proviso, that A. with the consent of the trustees, might make a jointure on his wife; it was held that this was an use executed in A. and not a trust estate, for it would have been a plain trust at common law, and what was a trust of a freehold or inheritance at common law, is executed by the statute which mentions the word *trust* as well as use; and the case of *Burchett v. Durdant*, 2 Vent. 312. adjudged to the contrary upon this point was denied to be law. 1 Lutw. 814. 823, *Broughton v. Langley*. S. C. 2 Ld. Raym. 879. 2 Salk. 679. And the same distinction

[q] So in 2 Taunt. 109. *Doe d. Leicester and others v. —* the devise being to trustees and their heirs in trust, to *pay unto or permit and suffer the testator's niece to have, receive, and take*

the rents and profits for her life, it was held that the use was executed in the niece, because the words *to permit, &c.* came last, and in a will the last words shall prevail.

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*Wiggan, and Thomas Richardson and their heirs the said dwelling-houses with the appurtenances, to have and to hold the said dwelling-houses with the appurtenances, to the said John Morton, Humphry Wiggan, and Thomas Richardson their heirs and assigns for ever, to the use of them the said John Morton, Humphry Wiggan, and Thomas Richardson their heirs and assigns for ever; by virtue of which said bargain and sale (18), they the said John Morton, Humphry Wiggan, and Thomas Richardson, were, and still are seised of the said dwelling-houses with the appurtenances in their demesne as of fee; without this, that the said Robert Yarway at the time of the acknowledgment of the said debt to the said John Jeffreson deceased, in the writ of *scire facias* above mentioned, or at any time after, was seised of the said dwelling-houses with the appurtenances in his demesne as of fee, in manner and form as by the return of the said writ of *scire facias* is alleged; and this they are ready to verify; wherefore they pray judgment, if the said John Jeffreson the now plaintiff ought to have his execution against them for the said debt, to be levied of the said dwelling-houses, whereof they are above respectively returned tenants, &c.*

(18) see note
(15).

And traverse the
seisin of R. Y.
at the time of the
recognizance.

was taken by Lord Kenyon in the case of *Doe on the demise of Woolly v. Pickard*, Stafford Summer Assizes 1797, and by Mr. Justice Lawrence in *Jones v. Prosser*, Worcester Spring Assizes 1798. The statute of uses is not held to extend to *copyhold estates*, for it is against the nature of their tenure that any person should be introduced into the estate without the consent of the lord, Gilb. Ten. 170.; nor to *leases for years* which are actually in existence at the time of their being assigned to the

use; as where A. possessed of a lease for years, assigns it to B. to the use of C., all the estate is in B., and C. takes only a trust or equitable estate. But if A. seised in fee makes a feoffment to the use of B. for a term of years, the term is served out of the seisin of the feoffee, and is executed by the statute. It is the same if he bargains and sells the estate of which he is seised in fee for a term of years. Dy. 369. a. and in the margin. 2 Inst. 671. [r]

[r] Nor does the statute of uses extend to cases where the party seised to the use and the *cestui que* use is the same person, except there be a direct impossibility for the use to take effect at common law. Bac. Law Tracts, 352. 2d ed. 4 M & S. 178. *Doe v. Prestwidge*. In that case a release was made to A. & C. and their heirs, *habendum* to

them and their heirs and assigns as tenants in common and not as joint tenants, to the use of them their heirs and assigns; held that A. & C. took as tenants in common. Cro. Car. 280. *Jenkins v. Young*. Ibid. 244. *Meredith v. Joanes*; and see Cruise's Dig. title Use. s. 31. et. seq.

And the said *Richard Jackson* says, that the said *John Jeffreson*, executor, cannot have his execution against him, for the said debt of the tenements aforesaid, whereof he is above returned tenant, because he says that he the said *Richard* is not (19) tenant of the said tenements as of freehold, nor was he on the day of suing out the writ of *scire facias* of him the said *John Jeffreson*, or at any time after; and this he is ready to verify; wherefore he prays judgment of the return aforesaid, &c.

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R. J. pleads
non-tenure
generally.

And the said *John Jeffreson* executor as to the said plea of the said *Richard Dawson* and *Alexander Orpwood*, above pleaded in bar of the said execution, says, that he by any thing before

Replication to
the plea of
R. D. and A. O.

(19) This *general* plea of non-tenure to a *scire facias* on a judgment in debt or other personal action, or on a recognizance, is held to be bad and demurrable to; the reason seems to be, because it is contrary to the return of the sheriff, who says he has warned the defendant, who is tenant of certain lands, &c.; but the defendant is at liberty to plead a *special nontenure*, that is, he may say that, before the judgment or recognizance, T. S. was seised in fee, and demised the lands to him for a term yet to come, and traverse that on the day of suing out the writ of *scire facias*, or at any time after, he was tenant as of freehold of the lands; or he may say that he is only tenant by elegit, or statute, and the like: and it is said that the distinction between a plea of general and special nontenure is now settled; after long and great difficulty. 2 Salk. 601. *Adams v. Savage*: S. P. Cro. Eliz. 872. *Flud. v. Penington*. 3 Lev. 205. *Barret v. Trotman*. The form of pleading a special nontenure is to be found in Co. Ent. 620. a. and post, 20.

The tenant may plead in the bar to the *scire facias* any thing which shews his lands not liable to execution; as that the person against whom the judgment was given, or the conusor, conveyed the lands to him, or some other

under whom he claims, *before* the judgment or recognizance, with a traverse of the seisin at the time of the judgment or recognizance, or at any time after. The conveyance must be made *bona fide*; for if issue be taken on the traverse, and the conveyance be found fraudulent, the verdict will be against the defendant. As where A. recovered judgment in debt against B. who died, and to a *scire facias* brought against the tenant, he pleaded that B. had enfeoffed him in fee long before the judgment, and traversed that B. was seised at the time of the judgment or ever after; and issue being taken thereon, the jury found the feoffment, but said it was made of covin to defraud the plaintiff and other creditors; and it was adjudged for the plaintiff, for B. remained still seised as against the creditors notwithstanding the feoffment; and the covin was properly given in evidence upon this issue, though it would not have been admissible upon the issue of *feoffavit vel non*, any more than the statute of usury can be given in evidence to avoid a deed on the plea of *non est factum*. Hob. 72. *Humberton v. Howgil*. So the tenant may plead that the defendant to the judgment or the conusor was not seised in fee. Thes. Brev. 272, 273. 289.

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admits that T. S.
was seized in fee,

and that he en-
feoffed R. Y.
and T. Y. in
fee.

R. Y. and T. Y.
after the recog-
nizance, convey-
ed the premises
to R. D. and
A. O. in fee,

alleged, ought not to be barred from having his execution, because he says that well and true it is, that long before the day of the recognizance by the said *Robert Yarway*, he the said *Thomas Smith* was seized of the said dwelling houses, with the appurtenances, whereof they are above returned tenants, in his demesne as of fee, and being so thereof seised afterwards and before the recognizance enfeoffed the said *Robert Yarway* and the said *Thomas Yarway*, of the dwelling-houses aforesaid, with the appurtenances, to have and to hold to the said *Robert Yarway* and *Thomas Yarway* their heirs and assigns, to the use of them the said *Robert* and *Thomas*, their heirs and assigns, for ever; by virtue of which said feoffment the said *Robert Yarway* and *Thomas Yarway* were seised of the said dwelling-houses, with the appurtenances, in their demesne as of fee, as the said *Richard Dawson* and *Alexander Orpwood* have above in pleading alleged; but the said *John Jeffreson* executor further says, that the said *Robert Yarway* and *Thomas* being so seized of the said dwelling-houses, with the appurtenances, they the said *Robert* and *Thomas*, after the recognizance aforesaid, to wit, on the 4th day of *July*, in the 14th year of the reign of our lord the now king, at the parish of *St. Clement Danes* aforesaid, by their certain indenture, bearing date the same day and year aforesaid, then and there made between them the said *Robert Yarway* and *Thomas Yarway* of the one part, and the said *Richard Dawson* and *Alexander Orpwood* of the other part, (one part of which said indenture, sealed with the seals of the said *Robert Yarway* and *Thomas Yarway*, and afterwards and within six months then next following duly enrolled of record in the court of chancery of our said lord the now king, at *Westminster* here, they the said *Richard Dawson* and *Alexander Orpwood* now bring here into court,) for and in consideration of a certain sum (20) of money by the said *Richard Dawson* and *Alexander Orpwood* paid to them the said *Robert* and *Thomas Yarway*, bargained and sold to the said *Richard Dawson* and *Alexander Orpwood* the aforesaid dwelling-houses, with the appurtenances, whereof they the said *Richard* and *Alexander* are above returned tenants, to have and to hold to them the said *Richard* and *Alexander*, and

(20) To plead a bargain and sale "for the considerations therein mentioned" generally, without shewing it to be for money for valuable consideration seems to be ill on special demurrer; but cured

by a verdict, or taking issue on a collateral fact; 2 Str. 1229. *Sargent v. Reed*; or on a general demurrer. 2 H. Bl. 261. *Bolton v. Bishop of Carlisle*.

their heirs for ever; by virtue of which said bargain and sale and enrollment, and also by force of a certain act made and provided in the parliament of the lord *Henry* the 8th, late king of *England*, holden at *Westminster*, in the county of *Middlesex*, on the 4th day of *February*, in the 27th year of his reign, for transferring uses into possession, the said *Richard Dawson* and *Alexander Orpwood* then and also at the time of the death of the said *Robert Yarway*, were seised of the said dwelling-houses, with the appurtenances, whereof they are above as aforesaid returned tenants, in their demesne as of fee; whereby a moiety of the said dwelling-houses, with the appurtenances, became and yet is charged and chargeable to the execution of the said *John Jeffreson*, executor for the debt aforesaid, by virtue of the said recognizance; *without this that the said Robert Yarway died seised of the said dwelling-houses with the appurtenances, in manner and form as the said Richard Dawson and Alexander Orpwood have above in pleading alleged.* And this he is ready to verify; wherefore he prays judgment and execution against them for the debt aforesaid to be levied of a moiety of the said dwelling-houses, with the appurtenances, to be adjudged to him, &c.

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whereby a moiety of the said premises became and is chargeable to execution.

This traverse is held to be immaterial and bad. See post. 28.

And the said *John Jeffreson* executor, as to the plea of the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, says, that he by any thing by them above in pleading alleged ought not to be barred from having his said execution against them for the said debt to be levied of the said dwelling-houses, with the appurtenances, whereof they are above returned tenants, because he says that the said *Robert Yarway*, after the said recognizance, to wit, on the said 16th day of *August*, in the aforesaid 12th year of the reign of our said lord the now king, was seised of the said dwelling-houses, with the appurtenances, whereof they the said *John Humphry* and *Thomas* are above returned tenants, in his demesne as of fee, in manner and form as by the return of the said writ of *scire facias* is above supposed; and this he prays may be enquired of by the country, and the said *John*, *Humphry*, and *Thomas* thereof likewise, &c.

Replication to the plea of J. M. H. W. and T. R.

that R. Y. was seised of the said dwelling-houses in fee and issue.

And the said *Richard Dawson* and *Alexander Orpwood* say, that the plea of the said executor above in replying pleaded, and the matter in the same contained are not sufficient in law for him to have his said execution maintained against them of the said lands and tenements whereof they as aforesaid are returned tenants, and that they have no necessity, nor are they

Demurrer to first replication.

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bound by the law of the land in any manner to answer to the said plea in manner and form aforesaid above in replying pleaded: and this they the said *Richard* and *Alexander* are ready to verify; wherefore, for want of a sufficient replication in this behalf, they the said *Richard* and *Alexander* pray judgment; and that the said executor may be barred from having or maintaining his said execution against them the said *Richard* and *Alexander*, for the said 4000l. of the said lands and tenements whereof they are returned tenants as aforesaid.

Joinder in demurrer.

[14]

Venire facias.

And the said *John Jeffreson* executor, as to the demurrer in law of the said *Richard Dawson* and *Alexander Orpwood*, since he has above in pleading alleged sufficient matter in law to maintain his having his execution aforesaid against the said *Richard Dawson* and *Alexander Orpwood* for the said debt, to be levied of the moiety aforesaid, with the appurtenances, which he is ready to verify; which said matter the said *Richard Dawson* and *Alexander Orpwood* do not deny, nor in any wise answer the same, but altogether refuse to admit the said verification as before, prays judgment and execution against them for the said debt, to be levied of a moiety of the said dwelling-houses, with the appurtenances, to be adjudged to him, &c. Therefore, as to try the said issue above in form aforesaid joined between the said *John Jeffreson* the now plaintiff, and the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, the sheriff is commanded that he cause to come before our lord the now king, in three weeks from the day of *Easter* next coming, wheresoever he shall then be in *England*, twelve free and lawful men of the neighbourhood of the parish of *St. Andrew, Holborn*, each of whom shall have 20l. of land, tenements or rent by the year at least, by whom the truth of the matter may be better known, and who are neither anywise akin to the said *John Jeffreson*, the now plaintiff, nor to the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, to recognize upon their oath the full truth of and upon the premises; the same day is given to the parties aforesaid there, &c. and as to the matter in law, whereof as well the said *John Jeffreson* the now plaintiff, as the said *Richard Dawson* and *Alexander Orpwood*, have put themselves on the judgment of the court here, a day is given as well to the said *John Jeffreson* the now plaintiff, as to the said *Richard Dawson* and *Alexander Orpwood*, before our said lord the now king, in the said three weeks from the said day of *Easter* next coming wheresoever, &c. to hear their judgment thereof, &c. because the

In general the venire facias is abbreviated in the entry thus, "12, &c. by whom, &c. and who neither, &c. to recognize, &c."

A continuance by *dies datus* as to the demurrer.

court here is thereof not yet, &c. And as to the plea of the said *Richard Jackson* above pleaded, he the said *John Jeffreson* the now plaintiff prays leave to imparl thereto before our said lord the now king unto the same term wheresoever, &c. and he has it, &c. the same day is given to the said *Richard Jackson* there, &c. at which day before our lord the king at *Westminster*, come the parties aforesaid in their proper persons; and as to the trial of the said issue above in form aforesaid, joined between the said *John Jeffreson* the now plaintiff, and the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, the sheriff returns the said writ in all things served and executed, together with a panel of the names of the jurors annexed to the said writ, none of whom, &c. therefore the sheriff is commanded that he do distrain them by all their lands, &c. and that of the issues, &c. so that he have their bodies before our lord the king on the morrow of the *Holy Trinity* wheresoever, &c. to recognize in form aforesaid; the same day is given to the parties there, &c. And as to the matter in law, whereof as well the said *John Jeffreson* the now plaintiff, as the said *Richard Dawson* and *Alexander Orpwood* have put themselves therein upon the judgment of the court, because the court of our lord the king here is not yet advised what judgment to give of and upon the premises put upon the judgment of the court, a further day thereof is given as well to the said *John Jeffreson* the now plaintiff, as to the said *Richard Dawson* and *Alexander Orpwood*, before our lord the king until the said morrow of the *Holy Trinity* wheresoever, &c. to hear their judgment of and upon the premises, because the court of our said lord the king here is thereof not yet, &c. And as to the said plea of the said *Richard Jackson* above-pleaded, he the said *John Jeffreson* the now plaintiff, further prays leave to imparl thereto before our lord the king until the same term wheresoever, &c. and he has it, &c. the same day is given to the said *Robert Jackson* there, &c. At which day before our lord the king at *Westminster* come the parties aforesaid in their proper persons; and as to the trial of the said issue above in form aforesaid joined between the said *John Jeffreson* the now plaintiff, and the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, the sheriff has not sent his writ thereof; therefore as before the sheriff is commanded that he distrain them by all their lands, &c. and that of the issues, &c. so that he may have their bodies before our lord the king in three weeks from the day of *St. Michael*

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Impar-
lance as
to the plea of
R. J.

Distringas.

Further conti-
nuance of the
demurrer.

[15]

Further impar-
lance to the
plea of R. J.

*Viccomes non
misit breve.
Alias distringas.*

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Replication
good.

Judgment for
the plaintiff.

Cesset executio.

Further impar-
lance to the plea
of R. J.

[16]

Vicetantes non
missi debet.

Another dis-
tringas.

Nisi prius.

wheresoever, &c. to recognize upon their oath more fully the truth of and upon the premises; the same day is given to the said parties, &c. And as to the matter in law, whereof as well the said *John Jeffreson* the now plaintiff, as the said *Richard Dawson* and *Alexander Orpwood* have put themselves upon the judgment of the court, for that it appears to the court of our said lord the now king here that the said plea of the said *John Jeffreson* the now plaintiff, in manner and form aforesaid above in replying pleaded, and the matter in the same contained, are good and sufficient in law to maintain him the said *John Jeffreson* to have his execution against the said *Richard Dawson* and *Alexander Orpwood* for the said 4000*l.* to be levied of a moiety of the said lands and tenements whereof they the said *Richard Dawson* and *Alexander Orpwood* are returned tenants as aforesaid, it is considered that the said *John Jeffreson* the now plaintiff have his execution against the said *Richard Dawson* and *Alexander Orpwood* for the said 4000*l.* to be levied of a moiety of the said lands and tenements, whereof they the said *Richard Dawson* and *Alexander Orpwood* are returned tenants as aforesaid, according to the force, form, and effect of the said recognizance, &c. but let execution thereon be staid until the plea between the said *John Jeffreson* the now plaintiff, and the said *John Morton*, *Humphry Wiggan*, *Thomas Richardson*, and *Richard Jackson* be determined, &c. And as to the said plea of the said *Richard Jackson* above pleaded, he the said *John Jeffreson* the now plaintiff further prays leave to imparl thereto until the said three weeks from the day of *St. Michael* wheresoever, &c. and he has it, &c. and the same day is given to the said *Richard Jackson* there, &c. At which day before our lord the king at *Westminster*, come as well the said *John Jeffreson*, the now plaintiff, as the said *John Morton*, *Humphry Wiggan*, *Thomas Richardson*, and *Richard Jackson*, in their proper persons; and as to the trial of the said issue above in form aforesaid joined between the said *John Jeffreson* the now plaintiff, and the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, the sheriff has not sent the writ thereof; therefore as before the sheriff is commanded that he distrain the jurors aforesaid by all their lands, &c. so that he have their bodies before our lord the king on the octave of *St. Martin* wheresoever, &c. unless our lord the king's faithful and beloved Sir *John Kelynge*, knt. chief justice of our lord the king, assigned to hold pleas in the court of our said lord the king,

before the king himself, shall first come on *Friday* on the morrow of *St. Martin* next to come, at *Westminster*, in the county of *Middlesex*, in the great hall of pleas there, for default of jurors, &c. the same day is given to the said parties, &c. And as to the said plea of the said *Richard Jackson*, above pleaded, he the said *John Jeffreson* the now plaintiff, prays farther leave to imparl thereto before our lord the king until the said octave of *St. Martin* wheresoever, &c. and he has it, &c.; the same day is given to the said *Richard Jackson*, there, &c. At which day before our lord the king at *Westminster*, come the said *John Jeffreson* the now plaintiff, and the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, in their proper persons; and the said chief justice before whom, &c. sent here his record before him had in these words, to wit: Afterwards on the day and at the place within contained before Sir *John Kehyng*, knt. chief justice of our lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, *John Squire*, gent. being associated to him according to the form of the statute, &c. come as well the within-named *John Jeffreson* the now plaintiff, as the within-written *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, in their proper persons; and the jurors of the jury whereof mention is within made being called, some of them, to wit, E. H., G. P., A. C., B. D., R. D., T. S., T. G., T. P., and T. S., come and are sworn upon that jury; and because the rest of the jurors of the same jury do not appear, therefore others of the by-standers by the sheriff of *Middlesex* chosen for this purpose, at the request of the said *John Jeffreson*, and by the command of the said chief justice, are appointed anew, whose names are annexed to the panel within written, according to the form of the statute in such case made and provided, which said jurors so appointed anew, to wit, D. B., T. J., and J. B., being called likewise come, who being elected, tried, and sworn to speak the truth of the within contained, together with the said other jurors, before impanelled and sworn, say upon their oath that the said *Robert Yarwey*, after the recognizance within specified, to wit, on the 16th day of *August*, in the 12th year of the reign of our said lord the now king within specified, was seised of the said dwelling-houses with the appurtenances, whereof they the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson* are within returned tenants, in his demesne as of fee, in manner and form as the said *John Jeffreson* the now plaintiff, has

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lance to the plea
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Postea.

Tales.

Verdict for the
plaintiff.

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Judgment for
plaintiff.

* [17]

Nolle prosequi
as to R. J.

Viccomes non
misit breve.

Distringas
issued.

Continuance of
the demurrer.

Further im-
parlance as to
the plea of
R. J.

within in pleading alleged. Therefore it is considered that the said *John Jeffreson* the now plaintiff, have his execution against * the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson* for the said 4000*l.* to be levied of the said dwelling-houses with the appurtenances, whereof they the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, are above returned tenants as aforesaid, according to the force, form, and effect of the said recognizance, &c. And thereupon he the said *John Jeffreson* the now plaintiff, freely here in court acknowledges that he will not any further prosecute against the said *Richard Jackson*, therefore let the said *Richard* be thereof quit, and go thereof without day, &c.

A vacatur by rule of court was made on *Monday* next after five weeks of *Easter*, in the 22*d.* year of king *Charles* the 2*d.*

The old roll was not extracted, but only a vacatur as appears by the roll, which is entered at the foot of the record, and then the entry is as follows. At which day before our lord the king at *Westminster* come the parties aforesaid in their proper persons, and as to the trial of the said issue above in form aforesaid joined between the said *John Jeffreson* the now plaintiff, and the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, the sheriff has not sent thereof the writ; therefore as before the sheriff is commanded that he distrain the jurors of the said jury by all their lands, &c. and that of the issues, &c. so that he may have their bodies before our said lord the king in three weeks from the day of *St. Michael* wheresoever, &c. to recognize upon their oath more fully the truth of and upon the premises; the same day is given to the said parties, &c. And as to the matter in law, whereof as well the said *John Jeffreson* the now plaintiff, as the said *Richard Dawson* and *Alexander Orpwood*, have put themselves therein upon the judgment of the court, because the court of our lord the king here is not yet advised what judgment to give of and upon the premises put upon the judgment of the court, a further day thereof is given as well to the said *John Jeffreson* the now plaintiff, as to the said *Richard Dawson* and *Alexander Orpwood*, until three weeks from the said day of *St. Michael* wheresoever, &c. to hear their judgment of and upon the premises, for that the court of our lord the king here is thereof not yet, &c. And as to the said plea of the said *Richard Jackson* above pleaded he the said *John Jeffreson* the now plaintiff further prays leave to imparl thereto until the said three weeks from the said day of

St. Michael wheresoever, &c. and he has it, &c. the same day is given to the said *Richard Jackson*, &c. At which day before our lord the king at *Westminster* come the parties aforesaid in their proper persons; and as to the trial of the said issue above in form aforesaid joined between the said *John Jeffreson* the now plaintiff, and the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, the sheriff has not sent the writ thereof; therefore as before the sheriff is commanded that he distrain the jurors aforesaid by all their lands, &c. so that he may have their bodies before our lord the king on the octave of *St. Martin* wheresoever, &c. unless our lord the king's beloved and faithful Sir *John Kelynge* knt. chief justice of our lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, shall first come on *Friday* on the morrow of *St. Martin* next coming; at *Westminster*, in the county of *Middlesex*, in the great hall of pleas there, for default of jurors, &c. the same day is given as well to the said *John Jeffreson* the now plaintiff, as to the said *John Morton*, *Humphry Wiggan*, and *Thomas Richardson*, &c. And as to the matter in law whereof as well the said *John Jeffreson* the now plaintiff, as the said *Richard Dawson* and *Alexander Orpwood* have put themselves therein on the judgment of the court, because the court of our lord the king here is not yet advised what judgment to give of and upon the premises put on the judgment of the court, a further day thereof is given as well to the said *John Jeffreson* the now plaintiff, as to the said *Richard Dawson* and *Alexander Orpwood* until the said octave of *St. Martin* wheresoever, &c. to hear their judgment of and upon the premises, for that the court of our lord the king here is thereof not yet, &c. And as to the said plea of the said *Richard Jackson* above pleaded, he the said *John Jeffreson* the now plaintiff further prays leave to imparl thereunto before our lord the king until the said octave of *St. Martin* wheresoever, &c. and he has it, &c. the same day is given to the said *Richard Jackson* there, &c. At which day before our lord the king at *Westminster* come the parties aforesaid in their proper persons, and the said chief justice before whom, &c. sent here his record before him had in these words, to wit: Afterwards on the day and at the place within contained, before Sir *John Kelynge* knt. chief justice of our lord the king, assigned to hold pleas in the court of our said lord the king before the king himself, *John Squire*, gent. being associated to him according to the form of the statute, &c. come as well the within named *John Jeffreson*

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Viccomes non
misit breve.

Alias distringas.

Nisi prius.

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Further conti-
nuance as to
the demurrer.

Further im-
parlance as to
the plea of
R. J.

Postea.

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Tales.

**Verdict for
plaintiff.**

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**Judgment for
plaintiff.**

Cesset executio.

**Nolle prosequi
against R. J.**

the now plaintiff, as the within written *John Morton, Humphry Wiggan, and Thomas Richardson* in their proper persons; and the jurors of the jury whereof mention is within made being called some of them, to wit, E. H., G. P., A. C., B. D., R. D., T. S., T. C., T. P., and T. S., come and are sworn upon that jury; and because the rest of the jurors of the said jury did not appear, therefore others of the by standers by the sheriff of *Middlesex* chosen for this purpose, at the request of him the said *John Jeffreson*, and by the command of the said chief justice, are appointed anew, whose names are annexed to the panel within written, according to the form of the statute in such case made and provided, which said jurors so appointed anew, that is to say, D. B., T. J., and T. B., being called likewise come, who being chosen, tried and sworn to speak the truth of the within contained, together with the said jurors before impanelled and sworn, say upon their oath that the said *Robert Yarway*, after the recognizance within specified, to wit, on the 16th day of *August* in the 12th year of the reign of our said lord the now king within specified, was seised of the said dwelling-houses with the appurtenances, whereof they the said *John Morton, Humphry Wiggan, and Thomas Richardson* are within returned tenants, in his demesne as of fee, in manner and form as the said *John Jeffreson* the now plaintiff has within in pleading alleged. Therefore it is considered that the said *John Jeffreson* the now plaintiff have his execution against the said *John Morton, Humphry Wiggan, and Thomas Richardson* for the said 4000*l.* to be levied of the said dwelling-houses with the appurtenances, whereof they the said *John Morton, Humphry Wiggan, and Thomas Richardson* are so as aforesaid returned tenants, according to the force, form and effect of the said recognizance; but let execution thereof cease until the plea between the said *John Jeffreson* the now plaintiff, and the said *Richard Dawson and Alexander Orpwood and Richard Jackson* be determined, &c. And thereupon the said *John Jeffreson* the now plaintiff freely here in court confesses that he will not any further prosecute against the said *Richard Jackson*, therefore let the said *Richard Jackson* be thereof quit and go thereof without day, &c. And as to the matter in law, whereof as well the said *John Jeffreson* the now plaintiff, as the said *Richard Dawson and Alexander Orpwood* have put themselves therein on the judgment of the court, because the court of our lord the king here is not yet advised what judg-

ment to give of and upon the premises put upon the judgment of the court, a further day thereof is given as well to the said *John Jeffreson* the now plaintiff, as to the said *Richard Dawson* and *Alexander Orpwood*, until the octave of *St Hilary* wheresoever, &c. to hear their judgment of and upon the premises, for that the court of our lord the king here is thereof not yet, &c. At which day before our lord the king at *Westminster* come as well the said *John Jeffreson* the now plaintiff, as the said *Richard Dawson* and *Alexander Orpwood* in their proper persons; and as to the matter in law whereof as well the said *John Jeffreson* the now plaintiff, as the said *Richard Dawson* and *Alexander Orpwood*, have put themselves therein on the judgment of the court, because the court of our lord the king here is not yet advised what judgment to give of and upon the premises put on the judgment of the court, a further day is thereof given as well to the said *John Jeffreson* the now plaintiff, as to the said *Richard Dawson* and *Alexander Orpwood*, until five weeks from the day of *Easter* wheresoever, &c. to hear their judgment of and upon the premises, for that the court of our lord the king here is thereof not yet, &c. At which day before our lord the king at *Westminster* come as well the said *John Jeffreson* the now plaintiff, as the said *Richard Dawson* and *Alexander Orpwood* in their proper persons, and thereupon all and singular the premises being seen, and by the court of our lord the king here more fully understood, and mature deliberation being thereupon had, for that it appears to the court of our lord the king here, that the said plea of the said *Richard Dawson* and *Alexander Orpwood* above pleaded in bar of the execution of him the said *John Jeffreson* the now plaintiff, is not sufficient in law, and that the replication of him the said *John Jeffreson* the now plaintiff to the said plea above pleaded, is also not sufficient in law to maintain him the said *John Jeffreson* to have his said execution, and so the demurrer in law thereof following is not aptly joined, therefore it is said to the said *John Jeffreson* the now plaintiff, and to the said *Richard Dawson* and *Alexander Orpwood*, that they do replead &c. that is to say, that the said *Richard Dawson* and *Alexander Orpwood* do answer anew to the said writ, and that the said parties do further proceed therein, and that they do descend to an issue of the country thereon, or plead to the judgment of the court therein. And thereupon the said *Richard Dawson* and *Alexander Orpwood* say, that *John Jeffreson* executor of the last will and testament of the said *John Jeffre-*

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Further continuance to the demurrer.

Further continuance of the demurrer.

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Parties ordered to replead.

Plea by R. D. and A. O.

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Executio non.
unless of a re-
version.

Because before
recognizance.

T. S. seised in
fee,

enfeoffed the
said R. Y. and
T. Y. in fee.

R. Y. and T. Y.
before the re-
cognizance, de-
mised the pre-
mises to one
W. W. for 99
years.

son deceased, in the said writ named, ought not to have execution of the said dwelling-houses with the appurtenances, in the return of the writ of *scire facias* mentioned for the debt aforesaid, by virtue of the said recognizance, unless of the reversion thereof, after the end of a certain term of 86 years, being parcel of a term of 99 years, of the said dwelling-houses, demised before the day of the said recognizance, and yet unexpired, and at the rent of a grain of pepper to be paid yearly during the said term; because they say that, long before the day of the said recognizance acknowledged by the said Robert Yarway in the writ of *scire facias* named, one T. S. was seised of the said dwelling-houses with the appurtenances in his demesne as of fee, and being so thereof seised afterwards, to wit, on the 20th day of June in the year of our lord 1656, enfeoffed the said Robert Yarway, in the said writ above named, and one Thomas Yarway, of the said dwelling-houses with the appurtenances, to have and to hold to the said Robert Yarway and Thomas Yarway their heirs and assigns, to the use of them the said Robert and Thomas their heirs and assigns for ever; by virtue of which said feoffment, they the said Robert and Thomas were seised of the said dwelling-houses with the appurtenances in their demesne as of fee, and being so thereof seised, they the said Robert and Thomas afterwards, and before the day of the said recognizance acknowledged by the said Robert Yarway, to wit, on the 4th day of January in the year of our lord 1656, at the parish of *St. Clement Danes* in the said county of *Middlesex*, by their certain indenture, the date whereof is the same day and year, did bargain, sell and demise the said dwelling houses with the appurtenances to one William Wymondesoll, esq. his executors, administrators and assigns, to have and to hold from the day next before the date of the said indenture, for the said term of 99 years from thence next following, and fully to be complete and ended; yielding therefore yearly to the said Robert Yarway and Thomas Yarway their heirs, executors, administrators and assigns one grain of pepper, if the same should be lawfully demanded; by virtue of which said bargain and sale, he the said W. W. was possessed of the said dwelling-houses with the appurtenances for the term aforesaid, and being so thereof possessed afterwards, to wit, on the 4th day of April in the 16th year of the reign of our lord Charles the 2d now king of England, &c. at the parish of *St. Clement Danes* in the said county of *Middlesex*, made his last will and testament in

writing, and thereby appointed *Dawes Wymondesoll*, esq. executor, and afterwards, to wit, on the 4th day of *April* in the 16th year aforesaid, he the said W. W. at the parish of *St. Clement Danes* aforesaid, in the county aforesaid died; after whose death the said *Dawes* took upon himself the burden of the execution of the said will; by virtue of which will, and of the said indenture of bargain and sale to the said W. W. in his life time in form aforesaid made, the said D. as executor of the said W. W. was possessed of the said dwelling-houses with the appurtenances for the residue of the said term of 99 years; and being so thereof possessed, he the said D. afterwards, to wit, on the 8th day of *December* in the 18th year of the reign of our lord *Charles* the 2d now king of *England*, &c. at the parish of *St. Clement Danes* aforesaid, in the county aforesaid, by his indenture, the date whereof is the same day and year, aliened and assigned to one *Elizabeth Orpwood*, spinster, and her assigns, the said dwelling-houses with the appurtenances, to have and to hold to the said *Elizabeth Orpwood* and her assigns from the time of the execution of the said last mentioned indenture, for the residue of the said term of 99 years then to come and unexpired so as aforesaid by the said indenture bargained and sold to the said W. W.; by virtue of which said last mentioned indenture, the said E. O. was possessed for the residue of the said term of 99 years, which was 88 years and 37 days from the time of the execution of the said indenture in form aforesaid made to the said *Elizabeth*. And being so thereof possessed the said E. afterwards, to wit, on the 21st day of *January* in the 19th year of the reign of our lord *Charles* the 2d. now king of *England*, &c. at the parish of *St. Clement Danes* in the county aforesaid by her certain indenture, the date whereof is the same day and year aforesaid, demised and granted the said dwelling-houses with the appurtenances to the said *Richard Dawson* and *Alexander Orpwood* and their assigns, to have and to hold the said dwelling-houses to them the said *Richard Dawson* and *Alexander Orpwood* from the day next before the date of the said last mentioned indenture, for the said term of 86 years from thence next following, and fully to be complete and ended; by virtue of which said indenture last mentioned, they the said *Richard Dawson* and *Alexander Orpwood* entered into the said dwelling-houses with the appurtenances, and were and yet are possessed for the said term of 86 years. And this they are ready to verify; wherefore they pray

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W. W. made his will, and appointed D. W. executor and died.

D. W. possessed of the said term.

D. W. assigned the premises to E. O. for the residue of the term.

E. O. demised the premises to R. D. and A. O.

Who entered and are possessed.

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* See Ow. 134.
Kempe v. Lawrence, Co. Ent.
624. s. 2. Ld.
Raym. 1256.
Adams v.
Savage.

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Replication.

W. W. surrendered the premises to the said R. Y. and T. Y.

and traverses that D. W. assigned the premises to E. O.

Rejoinder.

Takes issue on the traverse.

judgment if the said *John Jeffreson* ought to have his execution of the said dwelling-houses, unless of the reversion thereof after the end of a certain term of 86 years, being parcel of the said term of 99 years of the said dwelling-houses granted before the day of the said recognizance, and then unexpired, and of the rent of one grain of pepper payable yearly during the said term, &c.*

And the said *John Jeffreson* executor says, that he by any thing by the said *Richard Dawson* and *Alexander Orpwood* above in pleading alleged, ought not to be barred or delayed from having his execution of the said dwelling-houses with the appurtenances in the return of the said writ of *scire facias* mentioned, for the said debt, against them the said *Richard Dawson* and *Alexander Orpwood* by virtue of the said recognizance, because he says, that after the making of the said indenture of bargain and sale of the said dwelling-houses with the appurtenances to the said W. W. in the life-time of the said *Robert Yarway*, and also in the life time of the said W. W. and before the suing out of the said first writ of *scire facias*, to wit, on the 3d day of *April* in the said 16th year of the reign of our lord *Charles* the 2d, now king of *England*, &c. he the said W. W. at the said parish of *St. Clement Danes*, in the said county of *Middlesex*, surrendered the said dwelling-houses with the appurtenances to the said R. Y. and T. Y. and their heirs; without this that the said *Daves Wymondesoll*, after the death of the said W. W., aliened or assigned to the said E. O. the said dwelling-houses with the appurtenances, to have to her the said E. O. and her assigns for the residue of the said term of 99 years, in manner and form as the said *Richard Dawson* and *Alexander Orpwood* have above thereof in pleading alleged. And this he is ready to verify; wherefore he prays judgment and his execution of the said dwelling-houses with the appurtenances in the return of the said writ of *scire facias* mentioned, for the debt aforesaid, by virtue of the said recognizance to be adjudged to him, &c.

And the said *Richard Dawson* and *Alexander Orpwood* as before say, that the said D. W. after the death of the said W. W. did alien and assign the said dwelling-houses with the appurtenances to the said E. O. and her assigns for the said residue of the said term of 99 years, in manner and form as the said *Richard* and *Alexander* have above in pleading alleged; and of this they put themselves upon the country; and the said *John Jeffreson*, the now plaintiff likewise, &c.

Therefore the sheriff is commanded that he cause to come here before our lord the king on the morrow of *All Souls* wheresoever, &c. 12, &c. of the neighbourhood of the parish of *St. Clement Danes*, by whom, &c. and who neither, &c. because as well, &c.; the same day is given to the parties aforesaid, &c.

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Jeffreson executor of Jeffreson against Morton,
Dawson and others.

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Case 2.

SCIRE facias out of the petty bag in chancery by *Jeffreson executor of Jeffreson* against *Yarway*, to have execution upon a recognizance, dated the 16th of *August* in the 12th year of the présent king, acknowledged by him to the testator in chancery for 4000*l*. The sheriff returned that *Yarway* was dead; whereupon another *scire facias* issued against the tenants of the lands of *Yarway*, to which the sheriff returned a *scire feci* to *Morton*, *Wiggan*, and *Richardson*, tenants of two dwelling-houses with the appurtenances in *Gray's Inn Lane*, and also to *Dawson* and *Orpwood*, tenants of twelve dwelling-houses in *Shire Lane* in *Middlesex*, which were *Yarway's* at the time of the recognizance, &c. And further, "that there was not any heir, nor were there any other tenant or tenants of any other lands or tenements which were of the said *Yarway* to whom he could make known, &c." The defendants on the day of the return of the *scire facias*, appeared in chancery, and pleaded "that one *Richard Jackson*, long before the day of suing out the said writ, and always after, was and yet is tenant of a dwelling-house with the appurtenances in the parish of *St. Mary of Aldermanbury*, commonly called by the name of the *Axe Inn*, of which said dwelling-house the said *Robert Yarway*, namely, the conusor, was seised in his demesne as of fee, on the said 16th day of *August* in the 12th year of the reign of the now king, and that no writ of *scire facias* issued out of the court here, directed to the sheriffs of *London* against the tenants of the lands of him the said *Robert*," and prayed judgment if they ought to be compelled to answer to the writ; and then the entry of the record is in this manner, to wit; and thereupon he the said *John Jeffreson* the now plaintiff, for having the more speedy justice in this behalf, prays the writ of our lord the

S.C. 1 Sid. 436.
437. 1 Lev. 283.
1 Mod. 28, 29.
2 Keb. 529.
584. 587. 608.
621. 3 Keb. 25.
31.33. 129. 243.
To a *scire facias* in chancery, on a recognizance acknowledged there, against the tenants of the conusor, some of the defendants plead to issue, and the others demur; the record is delivered by the Chancellor to the court of K. B. for the purpose of trying the issue; the whole record must come to the court of K. B. which shall give judgment both on the verdict and demurrer, and the record shall not be sent back into chancery. See 9 Buls. 305. Blackstone's case. S.C. Sir W. Jones, 82. 90. Latch 3.

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king to be directed to the sheriffs of *London* to make known to the said *Richard Jackson*, that he be before our said lord the king in his said chancery to shew, &c. why the plaintiff should not have execution against him for the said debt, to be levied out of the said dwelling-house together with the other tenements. And thereupon a writ of *scire facias* issued against *Jackson*, returnable at a certain return, and the same day was given as well to the plaintiff as to the defendants, who had appeared and pleaded the above-mentioned plea; at which day the plaintiff appeared, and the sheriff returned the writ served, and *Jackson* and the other defendants also appeared, "whereupon it is said by the court here to the said *Richard Jackson*, that he do answer to the said writ sued out against him, and it is likewise said by the court to all the other defendants, that they do further answer to the said writ sued out against them under peril," &c. And thereupon the defendants *Dawson* and *Orpwood* pleaded in bar of execution, that before the entering into the recognizance, one *Thomas Smith* was seised in fee of the dwelling-houses whereof they were returned tenants; and being so seised, enfeoffed *Yarway* the conusor, and one *Thomas Yarway* in fee, whereby they were jointly seised in fee; and being so seised the conusor died, and therefore, as they intended, though it was not so pleaded, the tenements survived to *Thomas Yarway*, and traversed, "without this that the said *Yarway* the conusor was sole seised of the said dwelling-houses at the time of the recognizance," but did not say, "or at any time after," "and this; &c. wherefore, &c." The defendants, *Morton*, *Wiggan*, and *Richardson*, for the tenements whereof they were returned tenants pleaded in bar that one *Warne* was seised in fee in trust for *Yarway* the conusor, and, by a conveyance in which the conusor joined, conveyed to them, and traversed, "without this that the conusor was seised at the time of the recognizance or at any time after," and thereupon issue was joined. The defendant *Jackson* pleaded nontenure, to which the plaintiff imparled; and to the plea of *Dawson* and *Orpwood* he replied, and confessed that the conusor *Yarway* and *Thomas Yarway* were enfeoffed jointly, but he said that being so seised they, by bargain and sale indented and enrolled, in consideration of money, bargained and sold the tenements to the defendants in fee, whereby they were seised accordingly, "by means whereof a moiety of the said dwelling-houses with the appurtenances became, and yet is charged and chargeable to

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the execution of him the said plaintiff, for the said debt by virtue of the said recognizance," and further traversed, "without this that the conusor died seised of the said dwelling-houses, in manner and form as, &c. and this, &c.; wherefore he prays judgment and execution against them for the debt aforesaid to be levied of a moiety of the said dwelling-houses with the appurtenances to be adjudged to him," &c. To which replication the defendants demurred, and the plaintiff joined in demurrer; and the entire record of the demurrer and of the issue together was transmitted to the king's bench, and a day given to all the parties here, as well to *Jackson* upon the imparlance to his plea of nontenure, as to all the other defendants; and in *Trinity* term last past the defendants making no defence, the plaintiff had judgment on the demurrer, with a *cesset executio* until the plea should be determined on the issue, and on the plea of nontenure; and in *Michaelmas* term following, the issue was tried and found for the plaintiff, and judgment entered thereon, and a *nolle prosequi* on the plea of nontenure. And on the last day of *Michaelmas* term it was moved that these proceedings were irregular; because though an issue joined in chancery must be transmitted here, yet a demurrer is determinable in chancery, and ought not to be removed here; that it was done by the plaintiff's clerk without the knowledge of the lord keeper or of the court of chancery, and that it was a surprize upon the defendants, wherefore it was prayed that all the proceedings in this court should be vacated; and the first day of this term was given to the plaintiff to shew cause why the proceedings should not be vacated as was prayed by the defendants. And now in this term it was argued by *Finch* solicitor general, and *Saunders* for the plaintiff, and *Jones* for the defendants *Dawson* and *Orpwood*, who alone controverted this matter; and it was agreed that the proceedings were regular enough in point of practice. But the great question was, whether by law a demurrer can be adjourned out of chancery into this court, because all demurrers joined in chancery ought to be adjudged by the lord keeper or chancellor for the time being, as it was pretended; and in support of it 4 *Inst.* 80. was cited, where it is said, that if there be a demurrer in law in chancery it shall be argued and adjudged in the same court, and so is the constant practice to this day; to which it was answered for the plaintiff that it is true where there is a demurrer only, it has been always the practice to determine it in the court of chan-

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Question whether a demurrer can by law be adjourned out of chancery into the court of K. B.

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The chancery may adjourn any cause there depending at common law, and transmit the record into the K. B. to be determined, either after or before issue or demurrer joined.

cery without transmitting it into this court, but in the present case there is a demurrer and an issue also; and the issue must necessarily be transmitted into this court because the chancery cannot try it by a jury. If then the issue be transmitted into this court, and the demurrer be kept in chancery, there will be two judgments in two several courts upon one and the same record; and yet the plaintiff can have but one execution, namely, one *elegit* upon both judgments; and in that case out of which court shall he have it? out of chancery or out of the king's bench? for the two courts cannot join in making an execution; so that the plaintiff between both courts will fail of his right, which would be inconvenient. And though it has been the practice to adjudge demurrers in law joined in chancery before the lord chancellor, or keeper of the great seal in that court, yet the court of chancery may, if it will, adjourn any cause either after or before demurrer; as in *Sarnesfeld's* case cited in 8 Rep. 23. a. the *Prince's* case, where a *scire facias*, upon the supplication of the prince, was sued out of chancery, returnable in the same court, to repeal certain letters patent granted by king *Richard* the 2d, and confirmed by king *Henry* the 4th, and the defendant appeared in chancery, and afterwards the parties were adjourned into the king's bench, and they pleaded, and judgment was given there without sending the record back, though there was not any issue joined, but judgment was given by default against the defendant after an aid prayer granted, and a *procedendo* awarded; which proves that the chancellor may deliver a record and adjourn the parties into the king's bench out of chancery, whenever he pleases, either before or after a demurrer or issue joined. And it was farther said, that though it may be objected that the present case is not so entire but that the plaintiff may have two executions, namely, one out of chancery on the demurrer, and the other out of this court on the issue, without any inconvenience, yet the rule of this case must govern all other cases of a similar nature; and if it shall be understood that no demurrer can be adjourned here, some cases will be without any remedy. As if a clerk or other officer of chancery bring an action of trespass, or assault and battery, against two persons, by an attachment of privilege in chancery according to the usual practice there, and one defendant plead to issue and the other demurs, now the plaintiff is to recover joint damages against both; but if the demurrer cannot be trans-

mitted into this court as well as the issue, how shall the plaintiff be able to recover against both of them? So if one of the clerks in chancery impleads another there by writ of privilege for an assault, battery and wounding, and issue is joined on the wounding, and there is a demurrer to the assault and battery, now the jury who try the issue ought to inquire of the damages on the demurrer; but it cannot be done unless the demurrer be adjourned into this court as well as the issue. And if it be said that the chancery may first adjudge the demurrer, and afterwards transmit the issue into this court, yet that will not serve; for the record of the demurrer must of necessity come into this court either after or before judgment, because, unless the record of the demurrer be transmitted into this court, the plaintiff cannot have the damages on the demurrer inquired by the jury who try the issue: wherefore it was concluded that in this case the record of the demurrer, and issue were legally transmitted into this court.

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On the other hand it was objected by *Jones* for the defendants, that when an issue is joined as to part, and a demurrer to another part in chancery, and the issue is transmitted here to be tried, after the trial of the issue the record ought to be sent back into chancery for the chancellor or keeper to give judgment there upon it; and no inconvenience will follow, for the court of chancery has then the whole record upon which it may give judgment, and the party will have his entire judgment and execution there. And Lord *Coke* is of this opinion in the fourth part of his Institutes 80. where he says expressly, that after trial the record must be remanded, and judgment given there.

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But to this it was answered by the other side, that the constant practice is to the contrary, and though Lord *Coke* is of that opinion, yet the books which he cites in the margin do not warrant any such matter. For there is not any such book as 10 Edw. 3. 61., the 10 Edw. 3. having only 59 folios: and in the 24 Edw. 3. 65. there is nothing to the purpose to be found; and the 24 Edw. 3. 73. b. *The Bishop of Lichfield and Coventry's case*, makes against the opinion of Lord *Coke*; for that was a *scire facias* on a recognizance in chancery, and the defendant appeared and pleaded a release upon which they were at issue, and the record was transmitted into the court of K. B. to try the issue; the plaintiff was nonsuited, and afterwards brought a new *scire facias* in the king's

But see 10 Edw.
3. pl. 62.

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1 Str. 146.

When a record
comes into the
K. B. it is never
removed out of
that court.

bench upon the record there; and it was objected that he ought to resort to chancery to sue his *scire facias* there, but the objection was overruled, and it was adjudged that the plaintiff might bring his *scire facias* in the K. B. on the record of nonsuit in that court. Which case shews that after the nonsuit the record was not sent back into chancery, but was retained in the king's bench, and judgment given there upon the nonsuit; which is directly against the opinion of Lord Coke. And it appears in his reports, that if an issue be transmitted into the king's bench, that court retains it, and will give judgment upon it: as in *Digg's* case, in 1 Rep. 157. and *Steward's* case, cited in 9 Rep. 99. *Sir George Reynell's* case; in both of which cases, an issue being joined in chancery, the record was transmitted into the K. B. where several special verdicts were found, and the court of K. B. retained the records, and did not send them back into chancery, but gave judgment upon the special verdicts; and so is the continual practice at this day. And it is a well known rule, that when a record comes into the king's bench, it is never removed out of that court (1); wherefore it was concluded that the record shall not in any case be sent back to the chancery. And the whole court delivered their opinions *seriatim*, that the record of the demurrer and issue together, and also of the imparlance to the plea of *Jackson*, was well and legally transmitted into the king's bench, and that the chancery may adjourn any cause there depending at common law, and transmit the record of it into this court to be determined, either before or after issue or demurrer joined; and that the whole record must come here entire, which was proved by *Sarnesfield's* case before cited; wherefore they held all the proceedings regular in this case, and that they were well done—*Quod nota*.—See also 7 H. 4. 31. a. pl. 12.

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And the lord keeper of the great seal was also of this opinion; for it was moved before him by the defendants by petition, and he was attended by counsel on both sides before the matter was moved in the king's bench, and on hearing the matter above mentioned, he declared that in his opinion it was proper to transmit the entire record as aforesaid—And so the point was settled.

(1) S. P. 1 Roll. Abr. 584. (G.) 1 Roll. Rep. 287. *Bishop of Bristol v. pl. 2, 3. Bro. Record. 44. 46. All. 14. Proctor. 1 Salk. 352. Fazacharly v. Rex v. Holland. S. C. Sty. 20. 40. 75. Baldo. S. C. 6 Mod. 177, 178. 76. 84. 90. 94. Bro. Jurisdiction. 48.*

But then it was moved for the defendants that they might be heard to the matter of law in the replication of the plaintiff; for they said they were taken by surprize before; and this being granted, they objected that the replication was insufficient in law for the bad traverse: because when the plaintiff had shewn that *Yarway* the conusor, and the other joint-tenant, had made a bargain and sale in fee, it sufficiently confessed and avoided the dying seised alleged by the defendants, and therefore the plaintiff ought not also to have traversed the dying seised; for though the conusor had died seised of a joint estate in fee with his companion, yet by the making of the bargain and sale in his life time, a moiety of the dwelling-houses was charged and bound to the execution of the recognizance, notwithstanding they had a reconveyance, or disseised the barginee, and *Yarway* had afterwards died seised, and his companion survived him; and therefore the dying seised in this case was not material or traversable; and of such opinion was the whole court (2) in *Easter* term next following: wherefore both sides agreed by consent to alter the defendant's plea, and the plaintiff was to reply what he pleased, and so it was done, and the last roll of the case was extracted out of part, and a new roll containing the new pleading was added, whereby the whole case does not now appear, but at first it was as it is mentioned before.

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Careswell and another *against* Vaughan.

Case 3.

Easter 21 Car. II. Regis. Roll. 74.

OUR lord the king has sent to his justices of his great sessions of his county of *Merioneth*, his writ close in these words, that is to say; *Charles* the 2d, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to our justices of our great sessions of our county of *Merioneth*, greeting: Because in the record and proceedings, and also in the giving of judgment, in our

Writ of error
from the great
sessions in
Wales to the
king's bench.

(2) S. P. Dy. 366. a. pl. 36. *Ver-non's case*. 1 Saund. 22, 23. *Bennet v. Filkins*. Com. Pleader (G 3.) Yelv. 151. *Bedell v. Lull*. S. C. Cro. Jac. 221. 2 Str. 837. *Rex v. Abp. of Armagh*.

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court of our said great sessions, in a certain plea of land, between *William Vaughan*, esq. demandant, and *Eleaser Careswell* and *Lodwick Owen*, tenants, wherein he the said *William Vaughan* demandant, by our writ of *quod ei deforceat*, protesting to prosecute the said writ in the form and nature of our writ of entry *sur disseisin* at the common law, according to the form of the statute of *Ruthland*, demanded against the said *Eleaser Careswell* and *Lodwick Owen* tenants one messuage, 200 acres of land, 20 acres of meadow, 300 acres of pasture, 20 acres of wood, 100 acres of heath, and 40 acres of moor, with the appurtenances, in *Owyddelfynydd*, of which the said *Eleaser* and *Lodwick* deforced him, as it is said, manifest error has intervened, to the great damage of them the said *Eleaser* and *Lodwick*, as by their complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the said parties in this behalf, do command you, that if judgment be given thereupon, then you send to us, distinctly and openly under your seal, the record and proceedings aforesaid, with all things concerning the same, and this writ, so that we may have them on the octave of the purification of the blessed *Mary*, wheresoever we shall then be in *England*, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for amending the said error, what of right, and according to the law and custom of our realm of *England*, ought to be done. Witness ourself at *Westminster*, the 4th day of *December*, in the 20th year of our reign. *Norbury*. The writ is thus returned; the record and proceedings whereof mention is within made, with all things concerning the same, follow in these words, to wit: *Merionethshire*, to wit. The great sessions of our lord the king in the county of *Merioneth*, holden at *Dolgelley*, in the said county, before *Timothy Littleton*, serjeant at law, justice of our lord the king of the great sessions of our lord the king of the county aforesaid, and *John Griffith*, esq. one other justice of our said lord the king of his great sessions of the county aforesaid, on *Monday*, to wit, the 8th day of *October*, in the 12th year of the reign of our lord *Charles* the 2d, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. *Charles* the 2d, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to the sheriff of *Merioneth*, greeting: Command *Eleaser Careswell* and *Lodwick Owen*, that justly

and without delay they render to *William Vaughan*, one messuage, 200 acres of land, 20 acres of meadow, 300 acres of of pasture, 20 acres of wood, 100 acres of heath, and 40 acres of moor, with the appurtenances, in *Owyddelfynydd*, which they the said *Eleazer* and *Lodwick*, unjustly deforce him, as it is said, and unless they shall do so, and if the said *William* shall make you secure of prosecuting his claim, then summon by good summoners the said *Eleazer* and *Lodwick*, that they appear before the justices of our great sessions of your county at our next great session of the said county, wheresoever it shall be held in your county, to shew wherefore they have not done it; and have you there the summoners and this writ. Witness ourselves at *Caernarvon*, the 22d day of *September*, in the year of our reign, &c. the 12th: *Bulkely White*.—Pledges of prosecution, *John Doe* and *Richard Roe*.—Summoners, *Dio Den*, *Pio Pen*.—*Richard Anwill*, esq. sheriff.

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Merionethshire, to wit. Pleas at the great sessions of our lord the king in the county of *Merioneth*, holden at *Dolgelley*, in the said county, before *Timothy Littleton*, serjeant at law, justice of our lord the king of the great sessions of our lord the king in the county aforesaid, and *John Griffith*, esq. one other justice of our said lord the king of his great sessions in the county aforesaid, on *Monday*, to wit, the 8th day of *October*, in the 12th year of the reign of our lord *Charles* the 2d, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c.

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Merionethshire, to wit. *William Vaughan*, by the writ of our lord the king of *quod ei deforceat*, protesting to prosecute the said writ in the form and nature of the writ of our lord the king of entry *sur disseisin* in the *quibus*, in nature of the writ of assize of *novel disseisin* at common law, according to the form of the statute of *Ruthland*, demands against *Eleazer Careswell* and *Lodwick Owen*, one messuage, 200 acres of land, 20 acres of meadow, 300 acres of pasture, 20 acres of wood, 100 acres of heath, and 40 acres of moor, with the appurtenances, in *Owyddelfynydd*, whereof they the said *Eleazer* and *Lodwick* unjustly and without judgment disseised the said *William* within 20 years now last past, and which the aforesaid *Eleazer* and *Lodwick* deforce him, &c. And whereupon the said *William* by *Evan Vaughan* his attorney, says, that he the said *William* was seised of the said tenements, with the appurtenances in his demesne as of freehold in time of peace, in the time of our lord the now king, by taking

Demand against
the tenants.

Count.

Esplus.

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Plea in abate-
ment.

That the word
"message" is
mis-spelt.

"he" used in-
stead of "they,"
and an useless
"&c."

the profits thereof to the value, &c. and of which, &c. and thereupon he brings suit, &c.

And the said *Eleazer* and *Lodwick*, by *Ellis Hughes* their attorney, come and defend their right when, &c. and say that the writ is vitious in itself, and not sued out according to the course of the register, for that the said *William*, by his said writ, demands against the said *Eleazer* and *Lodwick* one *messuage*, which said word "*messuage*" is altogether without any sense or meaning, and according to the form of the register it ought to be "*mesuage*," and that the word "*he*," render in the said writ next after the word "*delay*," is incongruous and ought to be "*they*" render; and that the "&c." inserted in the said writ between "year of our reign" and "12," is an useless addition to the said writ, and is not in the form of the writ in the register in such case made and provided: wherefore inasmuch as the said writ in form aforesaid sued out is vitious, the said *Eleazer* and *Lodwick* pray judgment of the said writ, and that the same may be quashed; &c.

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And the said *William*, by his attorney, says, that by any thing by the said *Eleazer* and *Lodwick* to quash the said writ above in pleading alleged, the said writ of him the said *William* ought not to be quashed, because he says that the said plea in manner and form aforesaid pleaded, and the matter in the same contained are not sufficient in law, to which he has no necessity, nor is he bound by the law of the land to answer. And this he is ready to verify; wherefore he prays judgment, and that his writ may be adjudged good, &c.

Demurrer.

And the said *Eleazer* and *Lodwick*, since they have above alleged sufficient matter in law to quash the said writ, which they are ready to verify, which said matter the said *William Vaughan* does not deny, but altogether refuses to admit that verification, as before, pray judgment that the said writ may be quashed.

Joinder.

Continuance.

And because the justices here will advise of and upon the premises before they give judgment thereon, a day is given to the said parties here, until *Monday* in the next great sessions of our lord the king in the said county, to hear their judgment thereof, for that the justices here are thereof not yet, &c. At which said *Monday* in the said next great sessions of our lord the king in the county aforesaid, holden at *Dolgelly*, in the said county, before *Timothy Littleton*, serjeant at law, justice, &c. and *John Griffith*, esq. one other

justice, &c. on *Monday*, to wit, the 16th day of *September*, in the 13th year of the reign our lord the now king, come as well the said *William*, as the said *Eleazer* and *Lodwick*, by their attornies aforesaid: and because the said justices here will further advise of and upon the premises before they give judgment thereupon, a day is given to the said parties here, until *Wednesday* in the next great sessions of our lord the king in the said county, to hear their judgment thereon, for that the justices here are thereof not yet, &c. At which said *Wednesday* in the said next great sessions of our lord the king in the county aforesaid, holden at *Dolgelly* in the county aforesaid, before *Timothy Littleton*, serjeant at law, justice, &c. and the said *John Griffith*, esq. one other justice, &c. on *Wednesday*, to wit, the 9th day of *October*, in the 13th year of the reign of our lord *Charles* the 2d, now king of *England*, &c. come as well the said *William*, as the said *Eleazer* and *Lodwick*, by their attornies aforesaid: and because the justices here will further advise of and upon the premises before they give judgment thereupon, a further day is given to the parties aforesaid here, until *Monday* in the next great sessions of our lord the king in the county aforesaid, to hear their judgment thereon, for that the same justices here are thereof not yet, &c. At which said *Monday* in the said next great sessions of our lord the king, in the county aforesaid, holden at *Bala* in the said county, before *Timothy Littleton*, serjeant at law, justice, &c. on *Monday*, to wit, the 18th day of *August*, in the 14th year of the reign of our lord the now king, &c. come as well the said *William*, as the said *Eleazer* and *Lodwick*, by their said attornies, and thereupon the said plea of the said *Eleazer* and *Lodwick* pleaded to quash the said writ of the said *William* being seen, and by the justices here more fully understood, it appears to the same justices that the said plea in manner and form aforesaid pleaded, and the matter in the same contained, are not sufficient in law to quash the writ of him the said *William*, therefore it is considered that the said writ be adjudged good, and that the said *Eleazer* and *Lodwick* do answer anew, &c.

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Further continuance.

Further continuance.

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Judgment of respondents ouster.

And whereupon the said *Eleazer* and *Lodwick*, by their said attorney, come and defend their right when, &c. and thereupon vouch (1) to warranty *John Snell* of *Minhyneall*, in the

Defence of the tenants.
Foreign voucher.

(1) By this is meant when the tenant calls into court another who is bound either to defend the right against the demandant, or yield the tenant other land, &c. in value: it extends to lands of freehold or inheritance, but not to

CARESWELL county of *Cornwall*, gent. who hath no lands or tenements
& another v. within the said county of *Merioneth*, but only in the county
VAUGHAN. of *Cornwall*, by the aid of the court of our said lord the king,
Dies Datus. &c. and thereupon a day is given by the court here, as well

any *chattel*, real, personal, or mixt; for in the case of a chattel interest the party cannot vouch though he has a warranty, but may have an action of covenant, if it be by deed; or if by parol, an action upon the case, or of deceit, as the case requires. He that vouches is called the voucher, and he that is vouched the vouchee. The vouchee may appear *gratis* and enter immediately into the warranty; but if he do not, a writ of *summoneas ad warrantizandum* issues, and if the sheriff return him summoned, and he makes default, a *magnum cape ad valentiam* is awarded; and if he makes default again judgment is given against the tenant, and for him to have in value over against the vouchee. If the vouchee appears, and makes default afterwards, a *parvum cape ad valentiam* issues, and if he makes default again, then the same judgment is given as has been just mentioned. If the sheriff return that the vouchee *has nothing*, an *alias* and *pluries* writ of summons issues, and afterwards a writ of *sequatur sub suo periculo*; so called because the tenant loses his land without any recompense in value, unless he can bring in the vouchee to warrant the land. Therefore, if to the last mentioned writ the sheriff return that the vouchee has nothing, the demandant has judgment against the tenant, but he has no judgment to recover over in value, because the vouchee was never warned, and it appears he has nothing. But in the grand *cape ad*

valentiam, it appears that the vouchee has assets, and a default made by him after summons is an implied confession of the warranty. There must be nine returns between the *teste* and return of the *summoneas ad warrantizandum*. 2 Inst. 240. [a] When the vouchee enters into the warranty, he stands in the place of the tenant, and the demandant counts against him as against the tenant, 2 Inst. 241. But the tenant cannot vouch in an assize, for it is *festinum remedium*, 2 Roll. Abr. 745. pl. 14. Nor in a writ of entry in the nature of an assize, Ibid. 745. pl. 15. So in partition the defendant cannot vouch, for the land is not demanded, Moor, 21. pl. 70. So in dower against the heir, he cannot vouch, 2 Roll. Abr. 745. pl. 11. Nor in a *quod ei deforceat*, for recovery of lands claimed as dower, for it is in the nature of dower, 2 Roll. Abr. 744. (Q) pl. 2. Nor in a *quare impedit* for danger of a lapse, Ibid. pl. 6. Nor in ejectment of ward, Ibid. pl. 5. So a man shall not vouch in a *scire facias* to execute a fine, 2 Roll. Abr. 745. pl. 9. Nor in a *quod permittat* for turning of water, Ibid. pl. 12. And in a writ of intrusion, supposing the tenant himself abated, if he says that he is tenant for life, reversion to J. S. he cannot vouch J. S. because the writ is brought of his own wrong, Ibid. pl. 13.

There is a foreign voucher like that in the above entry, where the tenant being impleaded within a particular jurisdiction, as in *London, Wales*, and

[a] In the case of common recoveries, the returns were abridged to five, by stat. 16 Car. 1. c. 6. s. 10., and to

four by stat. 24 Geo. 2. c. 48. s. 8. See post, p. 42 i.

to the said *William*, as to the said *Eleazer* and *Lodwick*, in the plea aforesaid, &c. here, until *Monday* in the next great sessions of our lord the king in the county aforesaid. At which said *Monday* in the said next great sessions of our said lord the king, in the county aforesaid, holden at *Bala*, in the said county, before *Timothy Littleton*, justice, &c. on *Monday*, to wit, the 8th day of *October*, in the 14th year of the reign of our said lord the now king, &c. come as well the said *William*, as the said *Eleazer* and *Lodwick*, by their attornies aforesaid, and thereupon a further day is given by the said court, as well to the said *William* as to the said *Eleazer* and *Lodwick* here, until *Monday* in the next great sessions of our lord the king, in the said county; at which said *Monday* in the said next great sessions of our said lord the king, in the county aforesaid, holden at *Dologelly*, in the said county, before the said *Timothy Littleton*, justice, &c. and *Thomas Jones*, esq. one other justice, &c. on *Monday*, to wit, the 14th day of *September*, in the 15th year of the reign of our said lord the now king, come as well the said *William* as the said *Eleazer* and *Lodwick* by their said attornies. And thereupon he the said *William*, by his said attorney, says, that the said *Eleazer* and *Lodwick* ought not to be admitted to vouch to warranty the said *John Snell*, because he says that the said *John Snell* is not named in the said writ, wherefore he prays judgment if the said *Eleazer* and *Lodwick* ought to be admitted to such voucher to warranty.

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Further day.

Replication.
Counterpleads
the voucher.

And the said *Eleazer* and *Lodwick*, by their said attorney, say, that the counter-plea of the said *William* to the voucher to warranty by them the said *Eleazer* and *Lodwick*, is not sufficient in law to bar them the said *Eleazer* and *Lodwick* from having the said warranty, and that they to the said counter-plea in manner and form aforesaid pleaded, have no necessity, nor are bound by the law of the land to answer. And for causes of demurrer in law, according to the form of the statute in such case made and provided, they the said *Eleazer* and *Lodwick* shew these causes following, that is

Demurrer.

Causes of de-
murrer.

the like, vouches one to warranty, and prays that he may be summoned in some other county out of the jurisdiction of the court; though it may be more properly called a voucher of a foreigner called to warranty, Co. Litt. 101. b. 102. a. Pig. 144. 151. The statute of *Glocester* (6 Edw. 1.) c. 12. and the statute 9 Edw. 2. provide for foreign vouchers by tenants impleaded for lands in *London*, *Chester*, *Durham*, *Salop*, &c. See 2 Inst. 325, 326. And foreign vouchers in *Wales* are regulated by statute 34 and 35 H. 8. c. 26. s. 88.

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to say, first, because the said counter-plea is neither pleaded, filed, nor of record, at one and the same great sessions with the said voucher, nor at the second great sessions next ensuing after filing the said voucher of record in the said court of great sessions, but is filed at the third great sessions after the filing of the said voucher: secondly, for that the said *William*, in the said counter-plea, does not shew to the court here what sort of writ he intends in the said counter-plea, nor does he shew the nature, or parts, or form of the said writ, so that it may appear to the court here what sort of writ he the said *William* intends in the said counter-plea in which the said *John Snell* ought to be named: thirdly, for that the said counter-plea is not verified by the said *William* with any verification whatsoever, whereas in fact it ought to be verified by reference to the record of the said writ, or to some other verification: fourthly, for that it is not necessary that the said *John Snell* vouched to warranty by the said *Eleazer* and *Lodwick* should be named in the said writ, inasmuch as upon his voucher to warranty in the said writ he might warrant gratis according to the said voucher, without naming him in the said writ, by his the said *John Snell*'s appearing in person in court here ready to warrant according to the said voucher, without any summons against him the said *John Snell* to have warranty: And this they are ready to verify, wherefore, for want of a sufficient answer to their said voucher, the said counter-plea, in form aforesaid pleaded, is of no effect, and altogether invalid in law to bar the said voucher, for which and other causes existing in the counter-plea and record aforesaid, the said *Eleazer* and *Lodwick* pray judgment, and that the said voucher may stand, &c.

Joinder in de-
murrer.

And the said *William* by his said attorney says, that the said counter-plea by him the said *William* in form aforesaid pleaded, and the matter in the same contained, are good and sufficient in law to bar the said *Eleazer* and *Lodwick* from such their voucher to warranty, and because the said *Eleazer* and *Lodwick* do not answer the said counter-plea, nor in any wise deny the same, he the said *William*, as before, prays judgment if the said *Eleazer* and *Lodwick* ought to be admitted to such voucher to warranty of the said *John Snell*, &c. And because the said justices here will advise of and upon the premises before they give judgment thereon, a day is given to the said parties here until *Monday* in the next great sessions of our lord the king in the county aforesaid, to hear

Curia advisare
vult.

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their judgment thereon, for that the justices here are thereof not yet, &c. On which said *Monday* in the said next great sessions of our lord the king in the county aforesaid, holden at *Dolgelly*, in the said county, before the said *Timothy Littleton*, serjeant at law, justice, &c. on *Monday*, to wit, the 5th day of *October*, in the 15th day of the reign of our said lord the now king, &c. come as well the said *William*, as the said *Eleazer* and *Lodwick*, by their attornies aforesaid; and because the said justices here will further advise of and upon the premises before they give judgment thereon, a further day is given to the said parties here, until *Monday* in the next great sessions of our lord the king in the said county, to hear their judgment thereon, for that the said justices here are thereof not yet, &c. On which said *Monday* in the said next great sessions of our lord the king in the county aforesaid, holden at *Bala*, in the said county, before the said *Timothy Littleton*, serjeant at law, justice, &c. and *Thomas Jones*, esq. one other justice, &c. on *Monday*, to wit, the 8th day of *August*, in the 16th year of the reign of our lord the now king, come as well the said *William*, as the said *Eleazer* and *Lodwick*, by their attornies aforesaid; and because the said justices here will advise of and upon the premises before they give judgment thereon, a further day is given to the said parties here, until *Monday* in the next great sessions of our lord the king in the said county, to hear their judgment thereon, for that the said justices here are thereof not yet, &c. (here follow seven further continuances in the same words from one great sessions to another.) On which said *Monday* in the said next great sessions of our lord the king in the said county, holden at *Dolgelly*, in the said county, before *Timothy Littleton*, serjeant at law, justice, &c. and *Thomas Jones*, esq. one other justice, &c. on *Monday*, to wit, the 17th day of *August*, in the 20th year of the reign of our said lord the now king, &c. come as well the said *William*, as the said *Eleazer* and *Lodwick*, by their said attornies; whereupon all and singular the premises being seen, and by the said justices here, more fully understood, and mature deliberation being thereupon had, and because it seems to the said justices here, that the voucher to warranty of the said *John Snell*, by the said *Eleazer* and *Lodwick* in the said plea, does not lie, nor by the law of the land ought to be admitted, therefore it is considered by the court here, that the said *William* do recover his seisin against the said *Eleazer* and *Lodwick*, of the said tenements, with the appurtenances; and the said *Eleazer*

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Judgment for
plaintiff.
Plaintiff prays
a writ of seisin.

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and *Lodwick*, in mercy, &c. And thereupon he the said *William* prays a writ of our said lord the king to be directed to the sheriff of the said county, as well to cause him to have full seisin of the said tenements, with the appurtenances, as to enquire of the damages, &c. and it is granted to him returnable on *Monday* in the next great sessions of our lord the king to be holden in the said county.

Warrants of
attorney.

Merionethshire, to wit, warrants of attorney received at the said sessions before the said justices, &c.

Merionethshire, to wit, *William Vaughan*, demandant, puts in his place *Evan Vaughan*, his attorney, against *Eleazer Careswell* and *Lodwick Owen*, tenants, in a plea of land.

Merionethshire, to wit, *Eleazer Careswell* and *Lodwick Owen*, tenants, put in their place *Ellis Hughes*, their attorney, against *William Vaughan*, demandant, in a plea of land.

Assignment of
errors.

Afterwards, to wit, on *Wednesday* next after 15 days of *Easter* thence next following, before our lord the king at *Westminster*, come the said *Eleazer Careswell* and *Lodwick Owen*, by *William Walton*, their attorney, and say, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that the judgment aforesaid is given for the said *William Vaughan* against the said *Eleazer* and *Lodwick*, whereas by the law of this realm of *England*, the said judgment ought to have been given for the said *Eleazer* and *Lodwick*, against the said *William Vaughan*, and therefore in that there is manifest error; and the said *Eleazer Careswell* and *Lodwick Owen* pray the writ of our said lord the king to warn the said *William Vaughan* to be before our said lord the king, to hear the record and proceedings aforesaid, and it is granted to them, &c. by which it is commanded to the sheriff of *Merionethshire* aforesaid, that by good and lawful men of his bailiwick, he make known to the said *William Vaughan* that he be before our lord the king in five weeks from the day of *Easter* wheresoever, &c. to hear the record and proceedings aforesaid if, &c. and further to do and receive what the said court of our said lord the king shall consider of him in his behalf; the same day is given to the said *Eleazer Careswell* and *Lodwick Owen*, &c. At which day, before our said lord the king, at *Westminster*, come the said *Eleazer* and *Lodwick*, by their said attorney, and the sheriff has not sent the writ thereof; and the said *William Vaughan*, on the same day, being solemnly called, likewise comes by *Andrew Vidian*, his attorney; whereupon they the said *Eleazer* and *Lodwick*, as

Scire facias.

Viccomes non
misit breve.

before say, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid there is manifest error, by alleging the said errors by them in form aforesaid alleged; and they pray that the judgment aforesaid, for the errors aforesaid, and others, in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they may be restored to every thing which they have lost by occasion of the said judgment, and that the court of our said lord the king now here may proceed to examine as well the record and proceedings aforesaid, as the said matter above assigned for error, and that the said *William Vaughan* may rejoin to the said error, &c. Whereupon the said *William Vaughan* says, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he prays that the court of our said lord the king here may proceed to examine as well the record and proceedings aforesaid, as the said matter above assigned for error. But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day thereof is given to the said parties before our lord the king, until the morrow of the *Holy Trinity*, to hear their judgment thereupon, &c. for that the court of our said lord the king here is thereof not yet, &c. On which day before our lord the king at *Westminster*, come the said parties, by their said attornies, and because the court of our lord the king here is not yet advised what judgment to give of and upon the premises, a further day thereof is given to the said parties before our lord the king, until three weeks from the day of *St. Michael* wheresoever, &c. to hear their judgment thereupon, &c. for that the court of our said lord the king here is thereof not yet, &c. On which day before our lord the king at *Westminster*, come the parties aforesaid, by their attornies aforesaid; and because the court of our said lord the king here is not yet advised what judgment to give of and upon the premises, a further day thereof is given to the said parties before our said lord the king, until the morrow of the *Purification of the blessed Mary* wheresoever, &c. to hear their judgment thereon, for that the court of our said lord the king here is thereof not yet, &c. On which day before our lord the king, at *Westminster*, come the parties aforesaid, by their attornies aforesaid; whereupon as well the record and proceedings aforesaid, and the judgment given thereupon, as the cause and matter aforesaid

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In nullo est erratum.

Curia advisare vult.

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Judgment below affirmed.

Writ of inquiry awarded.

* Damages and costs were given in a writ of entry sur disseisin by the statute of Gloucester, 6 Edw. 1. c. 1. 2 Inst. 286.

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Return.

Judgment for the damages found the jury,

above assigned and alleged for error, being seen, and by the court of our said lord the king here more fully understood, and diligently examined, for that it appears to the court of our said lord the king here, that the said record is not in any thing vicious or defective, and that there is not any error in the said record, it is considered that the said judgment be in all things affirmed and stand in full force and effect, the said cause and matter above assigned for error in any wise notwithstanding. And thereupon he the said *William* prays the writ of our lord the king to have full seisin of the said tenements made to him, and it is granted to him, &c. returnable before our lord the king in 15 days from the day of *Easter* wheresoever, &c. And the said *William Vaughan* also prays the writ of our lord the king to inquire of the* damages on occasion of the said disseisin; and because it is not known to the court of our lord the king here what damages the said *William Vaughan* has sustained by reason of the said disseisin, the sheriff is commanded that, by the oath of 12 good and lawful men of his bailiwick, he diligently inquire what damages the said *William Vaughan* has sustained by reason of the said disseisin, and that he send the inquisition which, &c. to our lord the king on the morrow of the *Ascension* wheresoever, &c. under the seal and seals, &c. together with the writ of our said lord the king to him thereof directed; the same day is given to the said *William Vaughan*, &c. At which day before our said lord the king at *Westminster*, comes the said *William Vaughan*, by his said attorney, and the sheriff, to wit, *John Vaughan*, esq. returns a certain inquisition indented, taken before him at *Tallylyn*, in the said county of *Merioneth*, on the 7th day of *May*, in the 22d year of the reign of our said lord the now king, by the oath of 12, &c. by which it appears, that the said *William Vaughan* has sustained damages by reason of the said disseisin, to 190*l.* 3*s.* and 4*d.* Therefore it is (2) considered that the said *William Vaughan* do recover, against the said *Eleazer Careswell* and *Lodwick Owen*, his damages aforesaid, by the

(2) We have seen, that if a record be removed into the court of K. B. it always remains there, (ante, 27.) and as execution is founded upon the record, it must issue out of the court where the record is; and therefore when the judgment is affirmed in the K. B. on a writ

of error from the common pleas, courts of great sessions in *Wales*, or other inferior court, execution issues immediately out of that court. Bro. Error, 82. Cowp. 843. *Vicars v. Haydon*. 3 Term Rep. 657. *Cowperthwaite v. Owen*.

inquisition aforesaid, in form aforesaid, found; and it is further considered, that the said *William Vaughan* do recover against the said *Eleazer Careswell* and *Lodwick Owen*, 6l. 13s. and 4d. adjudged to the said *William Vaughan* by the court of our said lord the king here with his assent, according to the form of the statute thereof lately made and provided, for his charges, costs, and damages, which he has sustained by reason of the delay of the said judgment, on pretence of the prosecution of the said writ of our said lord the king of error; and that he the said *William Vaughan* have execution thereof, and of the damages aforesaid, by the said inquisition in form aforesaid found, &c.

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and costs.

Careswell and another *against* Vaughan.

Case 3.

ERROR brought by *Careswell* and *Owen* against *Vaughan*, to reverse a judgment given, in the great sessions of *Merionethshire*, in *Wales*, in which *Vaughan* was demandant, against *Careswell* and *Owen*, by a writ of *quod ei deforceat*, on the statute of *Ruthland* of 12 Edw. 1. which is not in print (3),

8. C. 1 Mod. 7.
2 Keb. 553.
563. 574. 603.
Mistakes of red-
dat and mesuag-
gium instead of
reddant and me-

(3) It is now printed in the appendix to *Ruffhead's* edition of the statutes; the title of the writ is, "Breve commune, quod in aliquo casu tangit jus, et in aliquo possessionem;" and the form of it is, "*Rex vicecomiti salutem; Precipe A. quod juste et sine dilatione reddat B. manerium de N. cum pertin. quod predictus A. ei deforceat, ut dicit, et nisi fecerit, et predictus B. fecerit te securum de clameo suo prosequendo, tunc summoneas per bonos summonitores predictum A. quod sit coram iusticiario nostro, ostensurus quare non fecerit. Et habeas ibi sum. et hoc breve. Dat. &c.*" or thus, "*Precipe A. quod juste, &c. reddat B. tantum terræ cum pertin. in N. ut supra.*" It was said by *Needham*, who had been justice of *Chester*, that a *quod ei deforceat* is usual in *Wales*, and the demandant may count in the nature of what action he will in a plea of land by custom there.

Bro. *Quod ei deforceat*, 9. cites 2 Edw. 4. 11. It is therefore held to be in the nature of a writ of right for tenant in fee simple. 5 Rep. 85. b. *Penryn's* case. Cro. Car. 179. *Gryffyth v. Jenkins*. Or of a *formedon* for tenant in tail. Ibid. 444. *Gryffyth v. Lewis*; or it may be brought by tenant for life, ante 30. tenant by the curtesy or in dower; for the statute of *Ruthland* appoints a general writ, and directs the demandant to make his protestation to sue in the nature of what writ he pleases, and extends as well to real actions at common law before the 12 Edw. 1. as to such as are given by statutes since. Cro. Car. 445. *Gryffyth v. Lewis*. S. C. Sir W. Jones, 380. 381. Plow. 126. b. *Buckley v. Thomas*. And therefore a *quod ei deforceat* given by the statute of *Westminster* 2. (13 Edw. 1.) c. 4. to tenant in dower, tenant in frank marriage, for life, or in tail, who lose their lands by default, is

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suagium, and a
superfluous &c.
in a writ of *quod*
ei deforceat, are
amendable by
the statutes of
8 H. 6. c. 12.
and 15. the pro-
viso in the last
statute, that it
shall not extend
into Wales, be-
ing annulled by
27 H. 8. c. 26.
If in a *quod ei*
deforceat in
Wales, in which
the tenant ought
not to vouch, he
nevertheless
vouches, and de-

(see Cro. Car. 445,) and made protestation to prosecute it in the nature of a writ of entry in the *quibus* (4), in nature of an assize of *novel disseisin* at the common law, and counted accordingly: the tenants pray judgment of the writ, because in the writ it was *he* render, whereas it should be *they* render, in the plural number; and because there was the word *messuage*, whereas it should be *mesuage*; and further, because there was a superfluous &c. in the writ; upon which there was a demurrer; and after several continuances, the writ was adjudged good, and a *respondeas ouster* awarded: and then the tenants vouch one *Snell*, of the county of *Cornwall*, "who has no lands or tenements in the county of *Merioneth*, but only in the county of *Cornwall*, summoned in the county of *Cornwall* by aid of the court of our lord the king, &c." and after some continuances, the demandant said that the tenants "ought not to be admitted to such vouching of the said *John Snell* to warranty (5), because he says that the said *John Snell*

within it. Ibid. So a common recovery may be suffered of lands in *Wales* upon this writ of *quod ei deforceat*. 1 Lev. 130. *Winne v. Lloyd*.

(4) If the writ of entry be upon a disseisin by the tenant himself to the demandant or his ancestors, it is in the nature of an assize, and is called a writ of entry in the *quibus*. F. N. B. 442. 7th edit. If it be upon a disseisin by any person under whom the tenant claims, it is a writ of entry in the *per*. Ibid. D. If upon a disseisin by B. to whom A. owes title, by whom the tenant claims, it is in the *per* and *cui*. Ibid. If upon a disseisin beyond these degrees, it is a writ of entry in the *post*. Ibid. See Booth. 172, 173. and 3 Black. Comm. 180, 181, 182.

(5) A warranty is defined by Lord Coke to be a covenant real annexed to lands, whereby a man and his heirs are bound to warrant the same, and either upon voucher, or by judgment in a writ of *warrantia carta*, to yield other lands to the value of those that shall be evicted by a former title: Co. Litt. 365. a. Warranty is either express or implied. An express warranty can only be made

by the word *warrantizo*. Lill. sect. 733. Co. Litt. 384. a. but an implied one may be created by other words; as *dedi* is a warranty to the feoffee and his heirs during the life of the feoffor; though *concessi* is not, either in a feoffment or fine, Co. Litt. 384. a. So in an exchange the word *excambium* imports a mutual warranty. Ibid. And in partition, it is implied that the one warrants the other. So where there is a gift in tail, or a lease for life of land, reserving rent, the donor or lessor is bound to warranty. Co. Litt. 384. b. So when dower is assigned, a warranty is implied. Ibid. An express warranty does not bind the heirs, unless they be named, as, *ego et heredes mei warrantizabimus*. Co. Litt. 383. b. 384. b. F. N. B. 312. H. 7th edit., but an implied warranty does. Co. Litt. 384. b. If a father and his heir apparent join in a feoffment with warranty, and the father die, the heir is doubly bound by his own warranty, and as heir to his father. Moor, 20. pl. 68. And if two join in a warranty, and one dies, the heir and survivor may be vouched, or the survivor alone, at the election of him who has the warranty.

is not named in the said writ, wherefore he prays judgment if the said (tenants) ought to be admitted to such voucher to warranty, &c." upon which plea the tenants demurred in law: and after several continuances the court below gave a peremptory judgment against the tenants, viz. that the demandant recover seisin of the land, and the tenants should be *in mercy; and a writ of *habere facias seisinam*, and a writ of inquiry of damages for the mesne profits was also awarded. And thereupon the tenants (the now plaintiffs) brought a writ of error in this court, which was argued several times by *Williams* and *Saunders*, for the plaintiffs in error; and they contended that the original writ was bad for the exceptions above mentioned, and cited some cases where original writs had been abated for similar faults, as 18 Edw. 2. Fitz. Assize, 375., where a writ was *debet* and *solet* instead of *debent* and *solent*, and abated for that cause, which is the same case with the present, for here it is *reddat* instead of *reddant*; and in 27 H. 6. 2. 6. pl. 37. † a writ of assize was abated for the omission of the word *tunc*; so 9 H. 7. ‡ 16. *habeas ibi hac breve* instead of *hoc breve* made the writ vitious, and it could not be amended; and they also urged that the statute 8 H. 6. c. 15. for amending defects in records, &c. has an express *proviso* that it shall not extend to any process in *Wales*, so that it remains at common law; wherefore the justices in the great sessions had erred in awarding a *respondeas ouster*, for they ought to have abated the writ; but this objection was dis-

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murs to a counter-plea to the voucher, and the demurrer is adjourned to another great sessions, it is peremptory on the tenant, though the voucher was illegal.

* [39]

† Fitz. Brief 105. Bro. Brief 22.

‡ Bro. faux Latin 78. Ibid. Amendment 62. Ibid. Obligation 71.

Ibid. But where two are *jointly* bound in an *obligation*, and one dies, the whole charge falls upon the survivor. Ibid. So with respect to the person to whom a warranty is made, it is held, that unless it be to another and his *heirs*, or in words which relate to heirs, as where lands are given to A. and his heirs, and the warranty is to him in *forma predicta*, it extends only for life. Co. Litt. 47.

a. 384. b. 385. b. If a man warrant to B. his *heirs and assigns*, it extends to all assigns and their assigns *toties quoties* for ever. Co. Litt. 384. b. [b] So a warranty extends to an assignee of *part*; as where there is a feoffment in fee of two acres, with warranty to the feoffee, his heirs and assigns, if he make a feoffment in fee of one acre, the feoffee shall vouch as assignee. Co. Litt. 385. a.

[b] Where B., in a release, covenanted for himself and his heirs with A. and C., their heirs and assigns, that he and his heirs would warrant the land to A. and C. (omitting the words "their heirs and assigns,") against himself and

his heirs, and all other persons, and that A. and C. their heirs and assigns should peaceably hold, &c. this was held to be a warranty to A. and C., their heirs and assigns. 4 M. & S. 178. *Doe v. Prestwidge*.

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allowed, for by the court it is amendable by the statute 8 H. 6. c. 12. by which it is enacted, "That for errors assigned or to be assigned in any record, process, or warrant of attorney, original writ or judicial, panel or return in any places of the same razed or interlined, or in any addition, subtraction or diminution of words, letters, titles, or parcel of letters found in any such record, process, warrant of attorney, writ, panel or return, which razings, interlinings, addition, subtraction or diminution at the discretions of the judges of the courts and places, in which the said records or process by writ of error or otherwise, be certified, do appear to be suspected, no judgment or record shall be reversed or annulled. And that the king's judges of the courts and places in which any record, process, word, plea, warrant of attorney, writ, panel, or return, which for the time shall be, shall have power to examine such records, process, words, pleas, warrants of attorney, writs, panels, or return, by them and their clerks, and to reform and amend (in affirmance of the judgments of such records and processes) all that which to them in their discretion seems to be misprision of the clerks in such records, processes, word, plea, warrant of attorney, writ, panel and return, (except appeals, &c.) so that by misprision of the clerk, no judgment shall be reversed or annulled." And though it was urged that this matter was not amendable in the great sessions, and the party there might take advantage of it by a plea in abatement; and that this court ought to give the same judgment as the great sessions should have given, which ought to be that the writ should abate, yet the court over-ruled the objection as already mentioned. Yet *quære* of this, for the court did not pay much regard to it; and the court further said, that now the statute of 8 H. 6. c. 15. was in force in *Wales*, by the statute 27 H. 8. c. 26. s. 2. by which it is enacted, "that the laws, ordinances, and statutes of this realm of *England* for ever, and no other laws, ordinances, nor statutes, from and after the feast of *All Saints* next coming, shall be had, used, practised, and executed in the said country or dominion of *Wales*, and every part thereof, in like manner, form, and order as they be or shall be had, used, practised, and executed in this realm," by which statute the court thought that now the said *proviso* in the statute of 8 H. 6. c. 15. was annulled, and that original writs may now be amended in *Wales* as well as in *England*, by force of the statute of 8 H. 6. c. 15.: and this seems to me the better rea-

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son*; but the court did not pay much regard to any of the said matters, but over-ruled the exception as aforesaid. Then it was argued, that the court of great sessions ought not to have given a peremptory judgment on the demurrer to the counterplea of voucher; and this depends on the statute of Westminster 1. c. 40. which prohibits vouchers out of the lien (6) and gives a counterplea of voucher; and if it be adjourned over to another day, it is peremptory against the tenant, if the counterplea be adjudged against him; but here, they said, was no voucher at all, for in an assize of *novel disseisin*, or in a writ of entry in the *quibus*, which is in nature of an assize of *novel disseisin*, no voucher lies. F. N. B. Warrantia Chartæ, 134. 33 H. 6. 23. a. Bro. Voucher, 121. † And the reason is because the tenant is supposed to be in of his own wrong; and therefore the tenant is not suffered to put in such frivolous voucher; but if he do, it ought not to be peremptory any more than where a defendant delays the plaintiff by one or two general imparlances, or pleads a dilatory plea in abatement which is over-ruled, and a *respondens ouster* awarded, and then puts in another dilatory plea in abatement, which ought not to be received by the court, for only one dilatory plea is allowable; yet if the court receive it, and there be a demurrer to it, and the plea awarded bad, it is not peremptory on the defendant; neither is it in this case. And it was further argued, that here there was no counterplea of voucher; for a counterplea of voucher should contain some matter of fact, in order to oust the voucher, but in this case nothing was said but that *Snell* is not named in the writ, which appears judicially to the court, without the shewing of the party; and therefore there was no counterplea of voucher, and the demurrer to it was not peremptory on the tenants. But if it had been a good counterplea, yet, it seems it is not peremptory, though it be adjourned to another term, as appears from the books of 40 Assize. pl. 2. (†) 11 H. 4. 23. (§) 26 H. 6. 40. (||) 8 H. 7. 7. 10 H. 7. 22. and therefore it was prayed that the judgment should be reversed. *Sed non allocatur*; for the statute was made to prevent delay, and there has been as great a delay by this illegal voucher, as could have been if the voucher had been legal.

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* 5 Rep. 49. b.
Vaughan's
case, 2 Bulst.
54. Hall v. Ro-
therom. Plow.
126. b. Buckley
v. Thomas.

† Ante 32.
note (1).

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‡ Bro. Peremp-
torie, 60.
§ Ibid. 10.
|| Ibid. 42.
This seems an
authority to the
contrary of what
it is cited to
prove.

(6) *Lien* is properly the binding of the vouchee by force of the warranty; for the vouchee says, "*Que aves vous à lier a garrantie?*" the tenant then shews the *lien*, that is, the deed or fine, &c. which binds the vouchee to warranty. See 2 Inst. 243.

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And if this voucher had been within the lien, yet it ought not to be foreign, namely, in a county in *England*, because it could not be tried; for the statute 34 & 35 H. 8. c. 26. has provided for the trial of a foreign voucher in any county in *Wales*, but if a foreign voucher be in any county in *England*, the justices may proceed notwithstanding such foreign voucher. And though the voucher be not counterpleaded but demurred to, it is still peremptory upon the tenant if it be adjourned, as it is here, for it is within the same mischief; and so is 2 Inst. 243. expressly; wherefore a rule was given for affirmance of the judgment unless cause in this term.

And now in this term, *Turner* serjeant, of *Gray's Inn*, took another exception, that it appears by the record that the court of great sessions begun on a *Wednesday*, whereas it is appointed by the statute 34 & 35 H. 8. c. 26. "that each of the said sessions shall be kept and continued by the space of six days in every of the said shire at either of the said times as hath been used within the said three shires of *North Wales*." And he said in *North Wales* the sessions always begun on a *Monday*, and continued for six days together without intermission: but here if the sessions begin on a *Wednesday*, a *Sunday* will intervene, which is not according to the custom of *North Wales*, and consequently not according to the statute. *Sed non allocatur*; for it does not appear that the sessions begun on a *Wednesday*, but the plea was adjourned until *Wednesday* in the next great sessions, so that the sessions might have begun on a *Monday*, and the plea adjourned to *Wednesday* in the same sessions, for every day of the sessions is as a several return; and the plea may well be continued to every day of the sessions. And *Kelynge* chief justice, and the court, thought that it would have been well enough if the sessions had begun on a *Wednesday*, for the intervention of *Sunday* does not discontinue the sessions, but they may be adjourned to *Monday*, because *Sunday* is *dies non juridicus*. And the sessions may be well kept and continued by the space of six days, notwithstanding the intervention of *Sunday*; for the statute does not appoint that they shall be kept and continued for six days together, or next and immediately following, but only for six days, which must be the length of the sessions, but is not necessary to be altogether without the interposition of *Sunday* or other feast. And the judgment was affirmed (7).

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Every day of
the great ses-
sions is as a
several return.

The great ses-
sions may be
adjourned to
Monday if a
Sunday inter-
venes, and need
not be conti-
nued for six
days together
by the statute
34 and 35 H. 8.
c. 26. s. 14.

(7) This perhaps may not be an common recoveries; for though they improper place to take some notice of are fictitious proceedings and amicable

actions, yet it is necessary the *actores fabulæ*, as they are sometimes termed, should be the same as in adversary suits; there must, for instance, be a demandant, a tenant, and a vouchee; and the writ must be brought against such person only as would be an unexceptionable tenant in an adversary action. Pigott 28.

A common recovery is with great correctness defined to be "a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee simple." Willes's Rep. 451. *Martin v. Strachan*. Being a judgment in a real action, it cannot of course be commenced without an original; if however it be suffered without, it is not void, but only voidable by error. 3 Rep. 3. a. *Marquis of Winchester's case*. The writ sued out upon this occasion is a writ of entry *sur disseisin in the post*, which is often called a *præcipe*, and the defendant the tenant to the *præcipe*. Pigott, 28. It is absolutely necessary that the tenant to the *præcipe* should have an estate of freehold by right or by wrong in the lands to be recovered; therefore where the limitation in a settlement was to the use of R. D. for and during the term of 99 years, if he should so long live; and from and after his death, or other sooner determination of the term, to the use of trustees and their heirs during the life of R. D. to support contingent remainders; remainder to the use of the first son and issue male of the body of R. D. lawfully begotten, and to the heirs male of the body of such first son lawfully issuing; and for default of such issue to the use of all and every other son and sons of R. D. severally and successively in tail male, with divers remainders over; R. D. together with his only son F. D. levied a fine, and suffered a recovery to the use of R. D. in fee. Willes C. J. of the C. P. delivered the unanimous opinion of all the

judges in the house of lords, that the freehold vested immediately in the trustees during the life of R. D. as a vested, and not a contingent, remainder, and was in them at the time of levying the fine; and therefore as the fine did not convey to the conusee an estate of freehold, and make him a good tenant to the *præcipe*, the recovery was void. Willes's Rep. 327. *Parkhurst v. Smith, lessee of Dormer*. It was never necessary that the tenant should have the freehold at the time of suing out, or even the return, of the writ of entry; if he acquired the freehold at any time before judgment it was sufficient. Thus where the tenant appeared on the return of the writ of entry, and vouched the tenant in tail, and a *summonas ad warrantizandum* issued, before the return whereof tenant in tail conveyed to the tenant by lease and release for life; and then appeared at the return of the writ of summons, and vouched over the common vouchee, it was assigned for error that the tenant was not seized of the freehold at the return of the writ of entry, but the recovery was held good; for per Holt C. J. if the tenant to the *præcipe* acquires the freehold before judgment, it is sufficient, for it cannot be said to be a recovery against him that had nothing. 2 Salk. 568. *Lacey v. Williams*, S. C. Carth. 472. 1 Ld. Raym. 227. 475. Holt. Rep. 614. Comb. 425. S. P. 1 Show. 347. *Samborne v. Belke*. But in consequence of the relation which the judgments had to the day of the return of the writ upon which the judgment was given, it frequently happened that although the deed to make a tenant to the *præcipe* was in fact executed before the appearance of the parties in court, yet the recovery was void on account of the relation back of the judgment to a day prior to that on which the deed was executed. As where a writ of entry was returnable

on the 26th of *November*, the lease and release to make a tenant to the *præcipe* were dated on the 26th and 27th, and the recovery was taken in court on the 28th; the recovery was held erroneous, because the judgment related back to the 26th, on which day the tenant had not the freehold. To prevent which the statute 14 G. 2. c. 20. s. 6. was passed, which enacts, "that every recovery shall be deemed good and valid to all intents and purposes, notwithstanding the fine, or deed or deeds, making the tenant to the writ, should be levied or executed *after the time of the judgment given in such recovery, and the award of the writ of seisin*, provided the same appear to be levied or executed *before the end of the term, great session, session or assizes*, in which such recovery was suffered, and the persons joining in such recovery had a sufficient estate and power to suffer the same." It has been held that, though the deeds to make a tenant to the *præcipe* be not executed *till after the execution of the writ of seisin*, still the recovery will be good by this statute, if the deeds be executed in the term in which the recovery is suffered. 2 H. Black. Rep. 46. *Goodright v. Rigby*, afterwards affirmed in error in the king's bench. 5 Term Rep. 177. [c] At the common law the writ would only lie against him who was actual tenant in possession of the freehold; 2 Leon. 58. *Ard's and Smith's case*; therefore where lands were let out on leases for lives, tenant in tail could not suffer a recovery unless he procured conditional surrenders from the lessees for lives, or they joined him in making the tenant to the *præcipe*: nor can he at this day, where there is an estate for life limited prior to his estate tail, unless he procure

a conditional surrender from the tenant for life, or join with him in conveying an estate to the tenant to the *præcipe*. Pigott, 41. But now with respect to lands let out on leases for lives, the statute 14 Geo. 2. c. 20. s. 1. reciting that several leases had been theretofore, and were thereafter likely to be made of honors, castles, manors, lands, tenements, and hereditaments for one or more life or lives under particular rents thereby reserved, and to be reserved; and that procuring surrenders of such freehold leases, or the tenants thereof to join, in order to make tenants to the writs of entry or other writs for suffering common recoveries, frequently occasioned great trouble, difficulty, and expence to tenants in tail, and the same could not in many cases be obtained by reason of the uncertainty in whom the legal estate of freehold under such leases was vested, and also by reason of the disabilities and incapacities of such lessees, or persons claiming under them; by means whereof purchases and family settlements were often delayed, and might be in great danger of being defeated, enacts, "that all common recoveries suffered, or to be suffered in his majesty's court of common pleas at *Westminster*, or in any other court of record in the principality of *Wales*; or in any of the counties palatine, or in any other court having jurisdiction of the same, of any honors, &c. without any surrender or surrenders of such lease or leases, or without the concurrence, or any conveyance or assurance from such lessee or lessees, or other person or persons claiming under such lessee or lessees, in order to make good tenants to the writs of entry, or other writs, whereupon such recoveries have been or shall be had or suffered, shall be as valid and ef-

[c] And afterwards in Dom. Proc. Cruise's Dig. 2d ed. vol. v. p. 339.

“fectual in law to all intents and purposes whatsoever, as if such lessee or lessees, or any other person or persons claiming under him, her, or them, had conveyed or joined in conveying, or shall convey or join in conveying a good estate of freehold to such person or persons, as has or have been, or shall become, tenant or tenants to such writs of entry, or other writs whereupon such common recoveries have been or shall be suffered.” This is a declaratory law, and seems to have restored the original tenant to the *præcipe*; for, before the statute of *quia emptores terrarum* (18 Edw. 1. c. 1.) subinfeudations, upon which rents and services were reserved, did not prevent a writ of entry from lying against the freeholder of the seignory; and therefore when common leases for one or more life or lives reserving rent came in use, they resembled subinfeudations, and ought not to have prevented the *præcipe* from being brought against the owner of the freehold under which the leases were granted. 1 Burr. 115. *Taylor v. Horde*. But with respect to prior estates for life they are expressly excepted in the statute 14 Geo. 2. c. 20. s. 2. by which it is provided, “That nothing in this act contained shall extend or be construed to extend, to make any common recoveries valid and effectual in law, unless the person or persons entitled to the first estate for life, or other greater estate (in case there be no such estate for life in being) in reversion, or remainder next after the expiration of such leases, has or have, by some lawful act or means, conveyed or assured, or joined in conveying or assuring, or shall by some lawful act or means convey or assure, or join in conveying or assuring, an estate for life at the least, to such person or persons as has or have been,

“or shall become, tenant or tenants to the writs of entry, or other writs, whereupon such common recoveries have been or shall be suffered.” The surrender of the prior estate for life must be made to him who has such immediate remainder or reversion in tail *before* he makes a tenant to the *præcipe*; for if it be *after*, it will be void, inasmuch as there will then be no remainder or reversion for the surrender to operate upon; therefore in that case it ought to be made to the tenant to the *præcipe*. Pigott, 50.

But sometimes it will be *presumed* that the tenant for life surrendered his estate, though there be no proof of it; as where *possession* has accompanied a recovery for a long time. Thus in an ejectment upon a trial at bar for lands in ancient demesne, a recovery in the court of ancient demesne was produced, which had been suffered a long time before, and possession had gone accordingly; but it appeared that part of the land was leased for life, and the recovery was suffered by him in the reversion, with a single voucher, so that there was no tenant to the *præcipe*. However the court said, that as possession had gone along with the recovery for so long a time, they would *presume* a surrender; 1 Vent. 257. *Anon.* S. C. 1 Mod. 117. by the name of *Green v. Proude*, and 3 Keb. 310. *Green v. Froud*. So where collateral evidence has been given of a surrender by tenant for life, the recovery has been adjudged good. As where on a trial at bar, the lessor of the plaintiff claimed under an intail in a family settlement, by which part of the estate appeared to be in jointure at the time of the recovery, and it was insisted, that there was no tenant to the *præcipe* for that part; but it was answered by the defendant that after 40 years had elapsed, a surrender should be presumed according to 1 Vent. 257.; and to fortify this presumption

they offered in evidence the debt-book of an attorney then dead, who had, among other expences of suffering the recovery, charged for drawing a surrender of the jointure estate, and for engrossing two parts of it, which the court received, for it was a material circumstance in the inquiry into the reasonableness of presuming a surrender, and not to be suspected to be done for that purpose; and the court declared, "that without that circumstance they would have presumed a surrender," and desired it might be taken notice of "that they did not require any evidence to fortify the presumption, after such a length of time." 2 Str. 1129. *Warren v. Grenville*. But where there is no ground for such presumption, and possession has not gone with the recovery, the court will not presume a surrender. As where a jointress tenant for life of part of the estate, was in possession thereof at the time of the recovery, and continued in possession until her death, when an ejectment was brought by the person in remainder for that part which was in her possession, the court held, that as possession had not gone with the recovery, but continued in the tenant for life until the ejectment, they could not presume a surrender, and the recovery was void as to that part, and thought that the proposition in *Strange* was too general. 2 Burr. 1065. *Goodtitle v. Duke of Chandos*. Indeed, where a person has a power to suffer a recovery, *omnia presumuntur rite et solemniter acta*, until the contrary appears. Cro. Jac. 455. *Griffin v. Stanhope*. 2 Lutw. 1549. *Leigh v. Leigh*: but if the contrary appear, there is an end of such presumption. As where on a trial at bar in K. B. in *Easter* term 1747, the validity of two common recoveries in 1714 and 1721, came in question, it was ruled by the court, that though at such a distance of time proper tenants to be *præcipe* should be pre-

sumed, *where no deed appears*; yet it appearing in the principal case, that there were deeds inrolled for that purpose, wherein proper parties did not join, so that it was manifest there were no good tenants to the *præcipe*, the court could not presume there were good tenants; and therefore directed the jury to find against the recoverers; which they did accordingly. 2 Str. 1267. *Keen v. Earl of Effingham*.

It is held that a husband seized of an estate tail in possession in right of his wife, may make a good tenant to the *præcipe* by deed only, without the wife's joining him in a fine. Pigott, 71, 72. Cruise, 52—55. 2d edit. Harg. and But. Co. Litt. 326. b. in the note. — The tenant to the *præcipe* may be made either by fine, feoffment, lease, and release, covenant to stand seized, surrender, or bargain and sale enrolled; if he be made by the latter, it is held that he may appear and count before the enrolment of the bargain and sale, provided it be enrolled within six months as prescribed by the statute; for though the freehold does not pass until enrolment, yet when that is done, the freehold is considered as having passed from the bargainor at the time when the bargain and sale was executed by relation. Cas. temp. Talb. 164. *Robinson v. Comyns*. Pigott, 56, 57.

It appears by what has been said, that the validity of common recoveries has frequently been called in question on account of irregularities in making a tenant to a *præcipe*; therefore to obviate this inconvenience, the statute 14 Geo. 2. c. 20. s. 5. already referred to, was made; which, reciting that it had frequently happened that the deeds for making the tenants to the writs of entry, or other writs, for suffering common recoveries, had been lost, or that the fines or deeds making the tenants to the said writs had not been levied or

executed till after the judgment given in such recoveries, and the writ of seisin awarded; by reason whereof great doubts had arisen, whether such recoveries for want of proper tenants to the writs, were good and effectual in law; to prevent such doubts for the future, and in order to render common recoveries more certain and effectual, enacts, "That every common recovery already suffered, or hereafter to be suffered, shall, after the expiration of 20 years from the time of the suffering thereof, be deemed good and valid to all intents and purposes, if it appear upon the face of such recovery that there was a tenant to the writ, and if the persons joining in such recovery had a sufficient estate and power to suffer the same, notwithstanding the deed or deeds for making the tenant to such writ should be lost or not appear."

But no prior term *for years* will prevent him that has the remainder in tail from suffering a common recovery. Pigott, 60, 51. and by the statute 21 Hen. 8. c. 15. it is enacted, that no term for years, nor estate held by statute merchant, staple, or *elegit*, shall be barred by a common recovery. Co. Litt. 46. a.

Having thus shewn who is a good tenant to the *præcipe*, it seems necessary to premise that a recovery may be suffered with a single, double, or treble voucher; a recovery with a single voucher is where the *præcipe* is brought against the tenant in tail himself, who vouches over the common vouchee. This is a good bar to the estate tail which the tenant in tail is actually seised of at the time of the recovery; but if he be disseised of the estate tail, or discontinue it by fine or feoffment, and take back an estate to himself in fee,

or in tail, and suffer a recovery with single voucher, it will not bar the estate tail for the reason above assigned; and the issue may avoid it by the plea, that his ancestor "*nient tenant tempore brevis, nec unquam postea.*" Pigott, 109—117. [d] A recovery with double voucher is where tenant in tail conveys an estate of freehold to an indifferent person against whom the *præcipe* is brought, who vouches the tenant in tail, who vouches over the common vouchee. It is now usual to have a recovery with double voucher at least, being in all cases the most safe, as it bars not only the estate whereof tenant in tail is then in possession, but also every other estate which he has any right to, or is interested in, though it be divested out of him, or discontinued and turned to a right. Pigott, 109. Bro. Recovery in Value, 19—30. A recovery with treble voucher is used to make a perpetual bar to the estate which the tenant to the *præcipe* was seised of, and also of every estate of inheritance which has ever been in the first or second vouchee or their ancestors, and also of all remainders and reversions depending on those estates, and all charges and incumbrances derived out of those remainders and reversions. That which is intended to be spoken of in this note is a recovery with a double voucher.

The tenant and vouchee either appear in person or by attorney; the tenant almost always appears in person, for as his appearance by attorney would be attended with an additional expence, care is generally taken to make either the solicitor employed to suffer the recovery, or somebody who will appear personally in court, tenant to the *præcipe*; the vouchee too very often appears in court in person. Let us then first suppose that both the tenant and vouchee

[d] See the reason further explained in Cruise's Dig. 2d ed. vol. v. 464.

appear personally; the first step regularly is to apply to the cursitor of the county where the lands lie, for a writ of entry, giving him proper instructions as to the quantity and quality of the lands, where situate, and the names of the parties, and thereupon he makes out a writ, the form of which may be seen *postea*, 86. 2 Black. Com. Appendix, 17. There must be 15 days at least between the teste and the return of the writ. — The next step is to draw on paper a *præcipe* in this form, "*Berkshire*, to wit, Com-
"mand *William Jackson*, gent. that
"justly, &c. he render to *Thomas White*,
"gent. 4 messuages, &c. (as in the writ of
"entry down to '*which he claims*, &c.')." At the foot of the *præcipe* are added these words, "tenant in person vouches to warranty *Roger Blagrave*, esq. who in person vouches *Thomas Francis Martin*;" — this is usually called a *præcipe* at bar. — The *præcipe*, with the writ of entry annexed to it, is then taken down to the court of common pleas, at *Westminster*, on some day of the term in which the writ is returnable, when the tenant and vouches (if more than one) appear at the bar before one of the serjeants, who examines such of the vouches as happen to be married women apart from their husbands, to learn whether they freely dispose of their interest in the premises or not, and subscribes his name to the *præcipe*. For by a rule of the court of C. B. made in *Trinity* term 30 Geo. 3. it is ordered, "that from and after the
"first day of *Michaelmas* term next, in
"every common recovery, wherein the
"vouchee or vouches shall personally
"appear at the bar of this court for the
"purpose of suffering such recovery, the
"writ of entry shall be sued out, and
"produced at the time of the recording
"of the vouchee or vouches appear-
"ance at bar at the foot of the *præcipe*
"in such recovery." Indeed when a peer of the realm suffers a recovery

in person, some of the serjeants count in open court, reciting the pleading of each party as set forth in the entry of the recovery almost *verbatim*. — The next step to be pursued is to have the writ of entry compounded at the alienation-office, in like manner as is done in a writ of covenant for a fine; the attorney-general's hand must then be had to it, for which he receives an ancient fee of 10s. A writ of seisin is then sued out, the form of which may be seen in *Wils. on Fines*, 371. 3d ed. This writ should bear teste the 4th day inclusive after the return of the writ of entry, as where the writ of entry is returnable on the morrow of *All Souls*, the writ of seisin must be tested on the 6th of *November*. There must also be 15 days between the teste and the return of the writ of seisin. If the writ of entry be returnable so late in the term that the writ of seisin cannot be returnable in that term, it is made returnable *forthwith*; as where the writ of entry is returnable on the morrow of *St. Martin*, (the 12th of *November*,) or on the octave of *St. Martin*, (the 18th of *November*,) there are not 15 days between either of these returns and the last return of the term, which is 15 days of *St. Martin* (the 25th of *November*). But if the writ of entry be returnable on the last day of a term, the writ of seisin must be returnable the first return of the next term; unless it be *Trinity* term, in which case it must be on the 2d return, because there are not 15 days between the last day of *Easter* term, and the morrow of the *Holy Trinity*. The writ of seisin must be sealed at the seal-office, and then together with the writ of entry, is returned at the return office, which is on the prothonotary's office. The return in the writ of entry is in this manner. "Pledges of prosecution, *John Doe* and *Richard Roe*. Summoners, *John Denn* and

" *Richard Fenn*, Sir *L. P.* bart. sheriff."

The return of the writ of seisin is thus indorsed, "By virtue of this writ to me directed on the 18th day of *November*, in the year within written, I caused full seisin of the tenement, with the appurtenances and advowson within specified, to be delivered to the within named *T. W.* as I am within commanded. Sir *L. P.* bart. sheriff."—The entry of the recovery is then drawn up, the form of which may be seen in *Wils. on Fines*, 330. 3d edit. The recovery when drawn out, is entered on a plea roll, which may be had out of the prothonotary's office; it is then to be exemplified on parchment or vellum; the form of the exemplification, where the writ of seisin is returned at the time of the teste of the exemplification, may be seen in *Wils. on Fines*, 359. The recovery is generally exemplified the same term in which it is suffered, and tested or dated the last day of the term, and after the return of the writ of seisin, unless it be returnable in the next term, in which case the exemplification always bears teste the last day of the term; and instead of entering the sheriff's return of the writ of seisin in the body of the exemplification, the award only of the writ of seisin is entered. See *Wils. on Fines*, 369. Afterwards the writ of entry, and writ of seisin, and the plea roll on which the whole proceedings are entered on record, as already mentioned, together with the exemplification, are taken unto the prothonotary's office, where the *præcipe*, and the teste and return of the writ of entry are entered on the recovery remembrance roll. See the form, *Wils. on Fines*, 373.

There are, however, many exemplifications of recoveries suffered between the commencement of the reign of queen *Anne* and that of *Geo. 2.* of which no entries upon the rolls in the treasury

of the common pleas are to be found, nor is there any writ of entry, summons, or seisin filed with the *custos brevium*. In order to prevent the inconvenience which might arise to purchasers from an omission of this kind, the statute 14 Geo. 2. c. 20. s. 4. reciting, "that
"whereas by the default or neglect of
"persons employed in suffering common recoveries, it has happened and
"may happen that such recoveries
"are not entered on record, whereby
"purchasers for a valuable consideration may be defeated of their just
"rights," enacts "that where any person or persons hath or have purchased, or shall purchase for a valuable consideration, any estate or
"estates in lands, tenements, or hereditaments, whereof a recovery or recoveries, is, are, or were necessary to
"to be suffered in order to complete the title, such person and persons,
"and all claiming under him, her, or them having been in possession of the
"purchased estate or estates from the
"time of such purchase, shall and may
"after the end of 20 years from the
"time of such purchase, produce in
"evidence the deed or deeds making
"a tenant to the writ or writs of entry,
"or other writs for suffering a common
"recovery, or common recoveries, and
"declaring the uses of a recovery or recoveries; and the deed or deeds so
"produced (the execution thereof being
"duly proved) shall in all courts of
"law and equity be deemed and taken
"as a good and sufficient evidence for
"such purchaser or purchasers, and
"those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and
"perfected according to the purport of such deed or deeds, in case
"no record can be found of such recovery or recoveries, or the same
"should appear not to be regularly en-

"tered on record: provided always
 "that the person or persons, making
 "such deed or deeds as aforesaid, and
 "declaring the uses of a common re-
 "covery or recoveries, had a sufficient
 "estate and power to make a tenant to
 "such writ or writs as aforesaid, and
 "to suffer such common recovery or
 "recoveries."

But it frequently happens that the vouchee cannot conveniently appear personally in court, in which case he makes a warrant of attorney to some other persons to appear for him. [e] The form of the warrant of attorney is this: "R. B. whom W. T. vouches to warranty, puts in his place L. M. and N. O. his attornies jointly and severally against T. W. to gain or lose in a plea of land;" at the foot of which is added what is called the caption; thus "taken and acknowledged on the 1st day of November, in the year of our Lord 1799, before us, A. B. C. D." The warrant of attorney must be acknowledged either before a judge, who must sign it, or before commissioners appointed by writ of *dedimus potestatem de attorney faciendo*, who must certify the names of the persons whom the vouchee appoints for his attornies, under their hands and seals in the manner above mentioned. The writ of *dedimus potestatem* is not founded on the statute of Carlisle, for that only extends to persons who acknowledge *finis*; but is provided by the *common law* to enable persons who cannot appear in court, to appoint attornies in their stead. When it is intended that the vouchee shall appear by attorney, the first step in practice seems to be to sue out a writ of *dedimus potestatem*, which is prepared by the cursitor of the county where the

lands lie, on his receiving from the solicitor a *præcipe* for that purpose. The *præcipe* is in the form already given when we treated of the appearance of the vouchee in person, except that at the end of the *præcipe* are added these words, "*dedimus potestatem* for R. B. whom W. T. vouches to warranty, directed to Sir W. M. N. M. A. B. and C. D." Then the *præcipe*, (omitting of course the directions for a *dedimus*) warrant of attorney, and caption, are engrossed upon the same parchment, which, together with the writ of *dedimus potestatem*, is delivered to the commissioners, before whom the vouchee acknowledges the warrant of attorney, and signs it; upon which they sign the caption, and annex the parchment containing the *præcipe*, warrant of attorney, and caption, as has been already observed, to the writ of *dedimus potestatem*: indorsing on the back of the writ this return signed by them: "The execution of this commission appears in a certain schedule to this commission annexed." A. B. C. D. The form of the writ of *dedimus* is in Wils. on Fines, 383. By statute 23 Eliz. c. 3. s. 5. it is enacted, that every person who shall take the knowledge of any warrant of attorney of any tenant or vouchee for suffering of any common recoveries, shall with the certificate of the warrant of attorney, certify also the day and year whereon the same was acknowledged. And that no person who takes any such knowledge of any warrant for any recovery, shall be bound to certify such warrant, except it be within one year next after the said knowledge taken; and that no clerk or officer shall receive any writ of entry, whereupon any common recovery is hereafter to pass, unless the

[e] Where the tenant to the *præcipe* is confined by illness, the court on motion have permitted him to appear

by a substitute, although not an attorney of the court. 5 Taunt. 355. *Cotton v. Murphy*.

day of the knowledge of the warrant shall appear, in or by such certificate. By a rule of the court of C. B. made in Hil. 14 Geo. 3. for the more effectual and certain proof of the due acknowledgments of warrants of attorney, taken from the tenants or vouchees in common recoveries by virtue of any writ of *dedimus potestatem*, it is ordered by the court, "that no common recovery, wherein the tenant or tenants, vouchee or vouchees, or any of them shall appear to defend by attorney, shall be arraigned at the bar, unless an affidavit or affidavits in writing on parchment shall be made and annexed to a copy of the *præcipe* and warrant or warrants of attorney acknowledged by such tenant or tenants, vouchee or vouchees, by virtue of any writ or writs of *dedimus potestatem*; in which affidavit or affidavits the person or persons making the same shall swear that he or they knew the party or parties acknowledging such warrant or warrants of attorney, that the same was or were duly signed and acknowledged upon the day and year, or several days or years mentioned in the caption or several captions thereof, that the party or parties acknowledging, and also the commissioners taking the same were all of full age and competent understanding, that the *femes-covert* (if any) were solely and separately examined apart from their husbands, and freely and voluntarily consented to acknowledge the same, that all the said parties knew the same warrant or warrants of attorney was or were intended for suffering a common recovery to pass his, her, or their estate or estates, and further, that the rasure or rasures, interlineation or interlineations (if any), in the body or caption of such original warrant or warrants of attorney, was or were made before the said parties, or any

" of them, signed the said warrant or warrants, and before the commissioners signed the said caption or captions; which affidavit or affidavits (together with the said copy of the *præcipe*, and warrant or warrants of attorney whereunto the same shall be annexed,) shall be filed in the office of enrolment of writs for fines and recoveries. And it is ordered, that all and every such affidavit or affidavits as aforesaid shall be made by some attorney or attorneys of the courts of *Westminster Hall*, or of the sessions in *Wales*, or of the counties palatine of *Chester, Lancaster, or Durham*; and shall be sworn before a person duly authorized to take affidavits in this court, except where the party or parties respectively, at the time of their acknowledging such warrant or warrants of attorney, shall be in that part of *Great Britain* called *Scotland*, or in *Ireland*, or in some other parts beyond the sea. And in case the said party or parties shall be in *Scotland*, then the said affidavit or affidavits shall be made by one of the clerks of his majesty's signet, and sworn before one of the judges or other persons duly authorized to take affidavits or depositions in the court of session, or court of exchequer in that part of the united kingdom. But if the said party or parties shall be in *Ireland*, or in any other parts beyond the seas, then the said affidavit or affidavits shall be made by one of the commissioners who hath taken the acknowledgment of such warrant or warrants of attorney, and shall be sworn either before some person duly authorized to take affidavits in this court, or before some magistrate of the place where such acknowledgment shall be taken, having authority to administer an oath, and in the presence of a public notary, which nota-

“ ry shall also certify in writing under
 “ his hand and seal, as well the due ad-
 “ ministering of the said oath, as also
 “ the name, signature, and office of the
 “ magistrate administering the same.”
 And by another rule of the same court
 made in *Trinity* term 30 Geo. 3. it is
 ordered, “ that from and after the 1st
 “ day of *Michaelmas* term next, in every
 “ common recovery, wherein the tenant
 “ or tenants, or the vouchee or vouchees,
 “ warrant or warrants of attorney shall
 “ be taken under a *dedimus potestatem*,
 “ there shall be written on every copy
 “ of the *præcipe*, and of such warrant
 “ of attorney, having such affidavit or
 “ affidavits as is or are required by the
 “ rule of this court, made in *Hilary*
 “ term, in the 14th year of the reign of
 “ his present majesty, to be thereto an-
 “ nexed, the *allocatur* of the Lord
 “ Chief Justice, or some one other of
 “ the justices of this court, in the same
 “ or like manner as *allocaturs* are now
 “ written on fines taken by *dedimus*
 “ *potestatem*; and the copy of the *præ-*
 “ *cipe* and warrant or warrants of attor-
 “ ney, with the *allocatur* thereon shall
 “ shall be filed, as directed by the said
 “ rule: and that, at the time of signing
 “ such *allocatur*, the writ of entry for
 “ such common recovery shall be pro-
 “ duced before the judge signing such
 “ *allocatur*, who may mark such writ
 “ with his title, name, or initials there-
 “ of; and such writ shall also be pro-
 “ duced at the time of the arraignment
 “ of such recovery.” And by another
 rule of the same court, made in *Mich.*
 39 Geo. 3. it is ordered, “ that from
 “ and after the last day of that term,
 “ no common recovery shall be suffered
 “ to pass, unless the taking of the war-
 “ rants of attorney for suffering any
 “ common recovery be before one of

“ the justices or barons of his majesty’s
 “ court of record in *Westminster* Hall,
 “ or one of the serjeants at law; or
 “ unless an affidavit be made and filed,
 “ stating that the commissioners taking
 “ the same are, to the best of the de-
 “ ponent’s information and belief, either
 “ barristers of five years standing, or
 “ solicitors or attornies of some of the
 “ courts in *Westminster* Hall, the judges
 “ of the court of sessions and exche-
 “ quer, or advocates and clerks to the
 “ signet of five years standing in *Scot-*
 “ *land*.” The last mentioned rule does
 not extend to attornies or solicitors of
 the courts of great sessions in *Wales*,
 or of the counties palatine, therefore
 they cannot take warrants of attornies
 under a *dedimus potestatem*. [*f*] As
 soon as the *dedimus potestatem* is re-
 turned by the commissioners, an appli-
 cation must be made to the cursitor for
 a writ of entry; and one of the judges
 of the C. P. on the production of the
 affidavit required by the above men-
 tioned rules of 14 Geo. 3. and 39 Geo. 3.
 which is annexed to a copy of the
præcipe and warrant of attorney, and
 also on the production of the writ of
 entry, according to the said rule of
 30 Geo. 3. (if he is satisfied) subscribes
 his *allocatur* at the foot of the copy
 of the *præcipe* and warrant of attor-
 ney, and afterwards they are taken
 with a *præcipe*, at bar to one of the
 serjeants, who subscribes his name twice
 at the foot of such *præcipe* which is
 written on plain paper, stating at the
 foot of it that “ the tenant in person
 vouches to warranty R. B. esq. who by
 attorney vouches to warranty *Thomas*
Francis Martin,” (the common vouchee)
 and the tenant’s appearance is af-
 terwards marked by the prothono-
 tary at the foot of the *præcipe*, thus

"at bar, the tenant's appearance is recorded by the court." As the vouchee is not present in court to enter into the warranty, there must be a writ of *summonas ad warrantizandum*, usually called a writ of summons, the form of which may be seen in Wils. on Fines, 388. This writ must bear teste the 4th day, inclusive of both days, from the return of the writ of entry, if the fourth day be a *dies juridicus* and a day in term. By the common law this writ of summons had nine returns; but by the statute 16 Car. 1. c. 6. s. 10. the returns were abridged to five, and now by statute 24 Geo. 2. c. 48. s. 8. are reduced to four inclusive; as if the writ of entry be returnable from the day of *Easter* in 15 days, the writ of *summons* must be returnable from the day of *Easter* in five weeks, being the 4. returns inclusive; and if there are three vouchees, the writ of summons for the 2d vouchee must be returnable four returns both inclusive from the return of the summons of the first vouchee; and to bear teste the 4th day inclusive from the return of the first writ of summons.

Regularly the warrant of attorney ought to bear date after the teste of the writ of summons; but if it should not, this circumstance will not invalidate the recovery. Thus where upon error it was insisted that the warrant of attorney of the vouchee bore date before the writ of summons, but it was answered that the vouchee might appear in person without any writ of summons, and make his attorney, and it should be so presumed, and therefore the process, viz. the summons, the *dedimus potesta-*

tem and warrant made by virtue thereof were superfluous and void. And the court said, that as a common recovery was a common assurance, they would never reverse it, if by any means they could make it good. 1 Lev. 130. *Winne v. Lloyd*. S. C. Sir T. Raym. 16. 1 Sid. 213. [g]

The recovery is arraigned of the term in which the writ of summons is returnable; therefore if a recovery be intended to be suffered of *Michaelmas* term (for instance), the writ of entry should be returnable on the morrow of *All Souls* and the writ of summons in 15 days of *St. Martin*, and the writ of *dedimus* should state that the writ of summons was issued returnable at that time. But it sometimes happens from various causes, that the warrant of attorney has not been taken in due time, so that the recovery cannot be arraigned of the term it was intended to be; wherefore it becomes necessary to apply to the court of C. P. for leave to arraign the recovery in a subsequent term. After such leave is obtained, the course then is to apply to the master of the rolls for an order upon the cursitor to make out a writ of entry returnable the term preceding the taking the acknowledgment of the warrant of attorney, and to make out a writ of summons returnable in the next term, and then the vouchee appears by attorney, and imparls from term to term until the term when the recovery is arraigned. As where an application was made to the court of C. P. in *Michaelmas* term 1778, to allow a recovery to be arraigned of that term, under the following circumstances:

[g] The warrant of attorney must be acknowledged before the return of the writ of summons, otherwise it is error; for the appearance is entered on the return day. 4 Taunt. 452. *Anon.* A warrant of attorney is not amendable by the

court, because it is the deed of a party. 6 Taunt. 373. *Forster v. Forster*, overruling 4 Taunt. 98. *Shaw v. Le Blanc*, and *Ibid.* 196. *Anon.* And see 6 Taunt. 652. *Fox v. Benbow*, acc.

The *dedimus* was tested the 26th of February 1777, and recited a writ of summons returnable the first day of Easter term 1777, but the warrant of attorney was taken at Bombay the 17th of December 1777; so that properly the summons should have been returnable, and the recovery had, in Hilary 1778. On application to the master of the rolls, he ordered the curiator to make out a writ of entry returnable in Michaelmas term 1777, upon which the officer made out a summons returnable in Hilary term 1778, of which term the tenants appearance was entered; and then they imparled from Hilary to Easter, and from Easter to Trinity, and from Trinity to Michaelmas term, when the recovery was arraigned. 2 Black. Rep. 1223. *Gibbons v. Stephenson*. But sometimes a difficulty occurs how to enter such a recovery properly of record; therefore perhaps the following form may be found serviceable. "And the said C. D. (the tenant) in his proper person cometh and defendeth his right, when, &c. And thereupon voucheth to warrant E. F. (the vouchee) summoned in the county aforesaid, let him have him here from the day of St. Hilary in fifteen days, by the aid of the court, &c. The same day is given to the said parties here, &c. And hereupon the said C. D. (the tenant) putteth in his place J. S. and L. K. his attornies jointly and severally against the said A. B. (the demandant) to gain or lose in the plea aforesaid, &c. At which day here cometh as well the said A. B. (the demandant) in his proper person, as the said C. D. (the tenant) by the said L. K. his attorney; and the said E. F. (the vouchee) being summoned, &c. likewise cometh by his attorney, and prays leave to imparl thereto here, until from the day of Easter in fifteen days, and he hath it, &c.; the same day is given to the parties aforesaid here, &c.

"At which day here cometh as well the said A. B. (the demandant) in his proper person, as the said C. D. (the tenant) by his attorney aforesaid, and the said E. F. (the vouchee) by his attorney aforesaid also cometh, and he prayeth further leave to imparl thereto here, until from the day of the Holy Trinity in fifteen days, and he hath it, &c. the same day is given to the parties aforesaid here, &c. At which day here cometh as well the said A. B. (the demandant) in his proper person, as the said C. D. (the tenant) by his attorney aforesaid, and the said E. F. (the vouchee) by his attorney aforesaid also cometh, and he prayeth further leave to imparl thereto here, until the morrow of All Souls, and he hath it, &c. the same day is given to the parties aforesaid here, &c. At which day here cometh as well the said A. B. (the demandant) in his proper person as the said C. D. (the tenant) by his attorney aforesaid, and the said E. F. (the vouchee) by his attorney aforesaid also cometh; and the said E. F. (the vouchee) freely warranteth the tenements aforesaid, with the appurtenances to the said C. D. (the tenant) &c. And hereupon the said A. B. demandeth against the said E. F., &c."

The other steps necessary to perfect the recovery, such as compounding the writ of entry at the alienation office, and the return of it, the issuing the writ of seisin, and procuring that also to be returned, are the same as when the recovery is suffered in person. But as the writ of *dedimus potestatem* is returned into the court of chancery, it is necessary to send a transcript of the writ, return, warrant of attorney and caption from thence into the C. B. by *mittimus*; therefore the entry of the recovery on the roll when it is suffered under a *dedimus*, differs from the entry of a recovery suffered in person in this respect, that in the former case the

mittimus and transcript are also entered verbatim on the roll. The form of the entry of a recovery with double voucher, where the tenant appears in person, and the vouchee by attorney on a warrant taken by a *dedimus potestatem* may be seen in Thes. Brev. 102—105. Wils. on Fines, 3d ed. 381.

If the vouchee die before the return of the writ of summons, the recovery is void; for no judgment can be given until the vouchee appear and make default; but he cannot appear until the return of the writ, and therefore judgment given subsequent thereto will be after his death, and consequently void; and this fact being collateral to the record, may be assigned for error. 1 Wils. Rep. 35. 42. *Wynne v. Wynne*. S. P. 1 Burr. 410. *Sheepshanks v. Lucas*. And the court will, upon an affidavit stating the death of the vouchee before the return of the writ of summons, stay the passing of the recovery. 2 Vent. 90. *Sir Thomas Gower's case*. So if the writ of summons be returnable on a Sunday, and the vouchee die on that day, the recovery is void, because Sunday being *dies non juridicus* judgment could not possibly have been given until the Monday following, consequently judgment must have been given after the death of the vouchee. 3 Burr. 1595. *Swann v. Broome*. S. C. 1 Black. Rep. 496. 526. So if the judgment be not regularly executed by the return of the writ of seisin, the recovery has no manner of operation. Sir W. Jones, 10. *Aubrey v. Lord Bridgwater*. Therefore if a special

verdict omit to find a writ of seisin or execution, it cannot be presumed by the court, and no advantage can be taken of the recovery, nor will the court grant a *venire de novo*. 1 Wils. 52. *Witham v. Lewis*. S. C. 2 Str. 1184. 4 Brown. P. C. 504. But Lord Kenyon in *Goodright v. Rigby*. 5 Term Rep. 179. said that the case of *Witham v. Lewis* has always been considered as a strange case; and the judges of succeeding times have been astonished, that no application was made to the court of common pleas to rectify the defect in that recovery, according to the usual practice of that court. But execution may be sued out, though the tenant in tail die after judgment and before execution, Co. Litt. 361 b. In truth the writ of seisin is never executed, for it is sufficient if the writ of seisin be sued out and returned.

A recovery suffered by husband and wife, will bar the wife of her dower, 2 Rep. 74. a.; *Lord Cromwell's case*. 10 Rep. 43. a.; *Portington's case*, Pigott, 66.; it being agreed by all the judges that the wife was named in the recovery that she might be barred of her dower. Plow. 515. *Eare v. Snow*. A woman may also bar herself of her jointure by joining her husband in suffering a recovery in the same manner, as in levying a fine. A recovery suffered by tenant for life, without the concurrence of the person in remainder or reversion, operates as a forfeiture of his estate for life, just as if he had levied a fine, or made a feoffment in fee. 1 Rep. 15. b. *Sir W. Pelham's case*. [h] A recovery

[h] But this must be understood of a bare tenant for life: for where B. tenant for life, with remainder to his first and other sons in tail, remainder to the heirs of his body in tail, suffered a recovery, the court held that it was no forfeiture, inasmuch as there was an estate upon

which the recovery might legally operate, viz. the remainder in tail in B., and the remainder to his first and other sons in tail was saved by the stat. 14 Eliz. c. 8. s. 2. 1 T. R. 738. *Smith v. Clifford*.

suffered by tenant in tail, passes to the recoveror an absolute fee simple derived out of the estate tail; so that if tenant in tail of lands by purchase, under a settlement made by an ancestor *ex parte maternd*, with the reversion in fee by *descent ex parte maternd*, suffer a recovery to the use of himself and his heirs, the lands will descend to his heirs *ex parte paternd*; for the new use arises out of the estate tail, and not out of the reversion in fee. *Martin v. Strachan*, Willes's Rep. 444. S. C. 1 Wils. 66. 2 Str. 1179. 4 Bro. P. C. 486. 5 Term Rep. 107. n. (a.) S. P. 5 Term Rep. 104. *Roe v. Baldwere*.

A recovery suffered by tenant in tail lets in all preceding incumbrances made by himself, and renders valid all the acts of ownership which he has exercised over the estate. As if tenant in tail makes a lease not warranted by statute 32 H. 8. c. 28. or confesses a judgment, or acknowledges a recognizance, and afterwards suffers a recovery, it will operate as a confirmation of those charges which were before defensible by the issue. 1 Rep. 62. a. b. *Capel's case*. 2 Rep. 52. b. *Cholmley's case*. Pigott, 120. 1 Wils. 277. *Beck v. Welsh*. Cruse on Recov. 284. 2d edit. It is therefore dangerous for a tenant in tail who has in any manner incumbered his estate to suffer a recovery, because the incumbrances become valid, and take place *before* any charge which is made on the lands *after the recovery*. And though a recovery be suffered for a *particular purpose*, yet it will confirm all *prior* incumbrances. As where tenant in tail mortgages for years, and afterwards in consideration of marriage suffers a recovery for the purpose of

settling a jointure on his wife, it will enure to make good the mortgage; so where he confesses a judgment, &c. and suffers a recovery *to any collateral purpose*, it makes good all such incumbrances. So where tenant in tail by lease and release previous to his marriage conveyed his estate to trustees to himself for life, remainder to his intended wife for life, remainder to the first and other sons of the marriage in tail male; the marriage took effect and there was issue a son; nineteen years afterwards the husband suffered a common recovery, *and declared it to be to the use of A. B. and his heirs in trust to sell the premises for the payment of his debts*. A. B. sold the lands for the payment of the debts according to the trust reposed in him; the tenant in tail died, and his son claimed the lands. The court were of opinion that the recovery enured to the uses of the settlement, and the purchaser had no title. 8 Burr. 1703. *Goodright ex demise of Tyrrell v. Mead*. But where tenant in tail with the reversion in fee creates incumbrances, and *his son*, on whom the estate tail and reversion descends, suffers a recovery, it will not like a fine operate so as to let the reversion into possession, and make it liable to his father's debts; because a recovery destroys all remainders and reversions, and the fee acquired by the recoveror is derived out of the estate tail. Therefore tenant in tail by descent, with reversion in fee in him also by descent, ought not to bar his estate *by fine*, but should suffer a recovery, which will effectually prevent the estate thus acquired from becoming liable to the debts or contracts of his ancestor. Cru. on Recov. 287. 2d edit.

William, the heir of William, *against* Gwyn. Case 4.

Easter, 20th of King Charles the 2d. Roll 260.

OUR lord the king has sent, to his justices of his great sessions in the county of *Brecon*, his writ close in these words, to wit: *Charles* the 2d, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to our justices of our great sessions of our county of *Brecon*, greeting: Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in the court of the lord *Charles* the first, late king of *England*, our most dear father, before Sir *Marmaduke Lloyd*, knt. and *Walter Rumsey*, esq. late justices of our said great sessions, by the writ of him the said late king, between *Sibil William*, late *Sibil Elkin* widow, who was the wife of *Thomas William*, and *Jenkin William* now deceased, that he the said *Jenkin* should render to the said *Sibil* her reasonable dower, which had fallen to her of the freehold which was of the said *Thomas* her late husband in *Llandcovalley, Broyullis, and Crickaderne*, whereof she had nothing, as it was said, manifest error has intervened, to the great damage of *William William*, gent. son and heir of him the said *Jenkin*, as by his complaint we are informed: we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the said *William* in this behalf, do command you, that if judgment be given thereupon, then you send to us distinctly and openly, under your seal, the record and proceedings aforesaid, with all things concerning the same, and this writ, so that we may have them in five weeks from the day of *Easter* wheresoever we shall then be in *England*, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of our realm of *England*, ought to be done. Witness ourself at *Westminster*, the 16th day of *February* in the 17th year of our reign.

Writ of error in
dower unde
nihil habet.

[43]

The record and proceedings, of which mention is made in this writ, with all things concerning the same, we send to our lord the king, at the day and place within contained, to this writ annexed, as within we are commanded. The answer Answer.

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of Sir *Richard Lloyd*, knt. and *Arthur Trevor*, esq. the justices within named.

Breconshire to wit. The great sessions of our lord the king of the county of *Brecon*, holden at *Brecon*, in the county aforesaid, on *Monday* the 19th day of *September*, in the 12th year of the reign of our lord *Charles* the First, late king of *England*, &c. before Sir *Marmaduke Lloyd*, knt. and *Walter Rumsey*, esq. justices of his said late majesty, of his said great session of the said county.—*Charles*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to the sheriff of *Breconshire* greeting: Command *Jenkin William*, that justly and without delay he render to *Sibil William*, widow, who was the wife of *Thomas William*, her reasonable dower, which falleth to her of the freehold which was of *Thomas William*, her late husband, in *Llande-valley*, *Crickaderne*, and *Broyullis*, whereof (1) she has nothing,

(1) This is called a writ of dower, *unde nihil habet*, and lies only against the tenant of the freehold. F. N. B. 346, 347. 7th edit.; the form of the writ is in the register, 170. which varies from the writ in this entry in nothing else but the style of the court. When a writ of dower is intended to be brought, the first step is to make out a *præcipe* for the writ in this form: "*Staffordshire*, to wit; Command A. B. that justly and without delay he render to C. D. widow, who was the wife of T. D. her reasonable dower, which falleth to her out of the freehold which was of the said J. D. late her husband, in the parish of E. or parishes of E. F. and G. whereof she has nothing, as she says—Returnable in eight days of *The Purification of the blessed Virgin Mary*." A writ is thereupon made out, which will not be valid, unless drawn in the form above mentioned; for where it was "command A. that, &c. he render to E. F. her reasonable dower, which falleth to her out of the freehold which was of B. F. late her husband," &c. an objection was taken to the writ, because it was not "command A. that,

&c. he render to E. F. who was the wife of B. F. &c." for she ought to be named wife of B. F. in the beginning of the writ; it being the name by which she has any claim to dower; the court held the objection fatal, and that the omission was not supplied by the subsequent words "*of B. F. her husband, &c.*" Cro. Jac. 217. *Fulliam v. Harris*. When the writ is obtained, the process is a summons, and *grand and petit cape*. F. N. B. 348. The summons is always made upon the land by two summoners, whether the tenant, or any other person for him, is there or not: and the demandant is not bound to give him notice of the summons. 2 Inst. 253. The manner of summoning the tenant the reader may see in Dalton, Sheriff, 149. 151. Hob. 193. *Allen v. Walter*. And for the avoiding of such summons in real actions, without convenient notice to the tenants of the freehold, it is enacted by statute 31 Eliz. c. 3. s. 2. "that after every summons upon the land in any real action, 14 days at the least before the day of the return thereof, proclamation of the summons shall be made on a *Sunday* immediately after

as she says, and whereof she complains that the said *Jenkin* deforceth her; and unless he shall do so, and if the said *Sibil* shall give you security to prosecute her claim, then summon by good summoners the said *Jenkin*, that he be before our

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divine service and sermon, if any sermon there be, and if no sermon there be, then forthwith after divine service, at or near to the most usual door of the church or chapel of that town or parish where the land, whereupon the summons was made, doth lie; and that proclamation so made as aforesaid shall be returned, together with the names of the summoners; and if such summons shall not be proclaimed and returned according to the tenor and meaning of this act, then no grand *cape* to be awarded, but alias and pluries summons as the cause shall require, until a summons and proclamation shall be duly made and returned according to the meaning of this act." Hence it appears that the summons and proclamation must be at least 14 days before the return of the summons, that is, of the writ of dower; the summons being returnable on the day of the return of the writ. The sheriff, upon the receipt of the writ makes his warrant in this form: J. W. esq. sheriff of *Staffordshire*, to M. N. and O. P. my bailiffs for this time only, greeting; by virtue of a writ of dower of our lord the king *unde nihil habet* to me directed, I command you that you command A. B. that justly and without delay he render to C. D. who was the wife of J. D. her reasonable dower, which, &c. (as in the writ) deforceth her; and unless he shall do it, then summon the said A. B. that he be before the justices of our Lord the King at *Westminster*, in 8 days of *The Purification of the blessed Virgin Mary*, to shew wherefore he will not do it; and that after the said summons is made, you do, at the most usual door of the parish church of the

parish of E. on *Sunday* next after the said summons immediately after divine service is ended, proclaim the same summons according to the form of the statute in such case made and provided. — Given under the seal of my office, &c." The form of the summons in consequence of this warrant from the sheriff is this, "By virtue of his majesty's writ of dower *unde nihil habet* to the sheriff of *Staffordshire* directed, and by virtue of the said sheriff's warrant to us directed, we do hereby require and command you, that you render to C. D. &c. (as in the writ) as she alleges, and complains that you the said A. B. keep her out of the same; and if you refuse so to do, then we do hereby summon you, that you be and appear before his majesty's justices at *Westminster*, in 8 days of *The Purification*, to shew cause why you do not." Afterwards the sheriff returns the writ thus indorsed: "Received, 1st *January* 1797. Pledges of prosecution, *John Doe* and *Richard Roe*. Summoners of the within named A. B. *Thomas Norris* and *James Sympton*; and after the aforesaid summons made, to wit, at the most usual door of the parish church of E. within specified, within which the tenements within mentioned do lie, upon the Lord's day, to wit, the 5th day of *January*, in the year of our Lord 1797, immediately after divine service and sermon in the said church was ended, I made proclamation of the aforesaid summons according to the form of the statute in such case made and provided. J. W. esq. sheriff."

It has been held, that the proclamation of the summons must be at the parish church door, though it lies in another county. Cro. Eliz. 472. *Re-*

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justices of our great sessions of your county, on *Monday* in our next great sessions to be holden in your county, where-soever it shall happen to be holden in your county, to shew wherefore he has not done it, and have there the summoners,

gister's case; and it must appear on the return, that the land lies within the parish where the proclamation of the summons was made; and that the proclamation was made *after the summons*.

1 Mod. 197. *Furnis v. Waterhouse*.

Where the lands lie in several parishes or townships, it seems that a proclamation made at the church or chapel door of *one* parish or township is sufficient within the act. Hob. 133. *Allen v. Walter*. But a return that the sheriff had proclaimed "*the contents of the writ,*" is insufficient, because he must proclaim that he made summons of the land. Ibid. However, according to the modern practice, it seems sufficient to return that he the sheriff had made proclamation of the said summons according to the form of the statute, &c." On the return of the summons, the tenant is entitled to an *essoign*, which is entered in the office of the clerk of the *essoins* of the C.B. upon the day of such return: but it cannot be entered *by attorney*: for it is inconsistent to say that a man has a legal excuse for not appearing, when he does really appear by attorney.

2 Wils. 164. *Anson v. Jeffreson*. After the *essoign* is entered by the tenant, it is the duty of the demandant to adjourn it; and if he neglect to do so, after a rule given by the tenant, "unless the demandant shall adjourn the *essoign*, a *non-pross* will be signed," the tenant may sign a *non-pross*; which rule and *non-pross* are given in the office of the clerk of the *essoins*, on rolls kept for that purpose. 1 Rich. Pract. of C. P. 26. 5th edit. By the statute 24 Geo. 2. c. 48. s. 3. the day of adjournment in a writ of dower is to the *fourth* return next ensuing the return of the writ of dower

both inclusive; as if the writ be returnable in 8 days of *The Purification*, the adjournment day is in *one month of Easter*. But if the tenant do not enter his *essoign* on the return of the summons, the demandant may, on the day of exceptions, which is the day next after the *essoign* day, enter a *ne recipiatur*.

If the tenant neglect to appear on the return of the summons, or enter an *essoign*; or, in case of an *essoign* being entered, do not appear on the day given by the adjournment of the *essoign*, which, we have seen, is the fourth return day after inclusive, the next process, for the demandant to sue out, is the *grandcape*. The form of the writ, when the default is for not appearing on the return of the summons, may be thus: "*George* the third, &c. take into our hand, by the view of good and lawful men of your county, the third part of 2 messuages, 100 acres of land, 10 acres of meadow, and 5 acres of wood, with the appurtenances, in the parish of E., in your county, which C.D. in our court before our justices at *Westminster*, claims, as the dower of her the said C.D. of the endowment of J.D. her late husband, against A.B. by our writ of dower *unde nihil habet*, for the default of him the said A.B.; and the day of the taking thereof make known to our justices at *Westminster* by your letters under seal; and summon by good summoners the said A.B. that he be before our justices at *Westminster*, in 15 days of *Easter*, to answer and shew wherefore he was not before our justices at *Westminster*, in 8 days of *The Purification*, according as he was summoned;" but when the default is for not appearing on the adjournment day of the *essoign*, then,

and this writ. Witness ourself at *Brecon*, the 3d day of *September*, in the 12th year of our reign. *Pembroke* and *Montgomery*. Pledges to prosecute *John Doe* and *Richard Roe*.—Summoners, *John Denn* and *Richard Fenn*.—*John Herbert*, esq. sheriff.

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Breconshire, to wit. It is considered by the court of our lord the king here, that *Lewis Lloyd*, gent. and *Hugh Meredith*, gent. do sue for *Sibil William*, who is within age, as her next friends, against *Jenkin William*, in a plea of dower.—*Charles*, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to the sheriff of *Breconshire*, greeting; Command *Jenkin William*, that justly and without delay he render to *Sibil William*, widow, who was the wife of *Thomas William*, her reasonable dower, which falleth to her of the freehold which was of *Thomas William*, late her husband, in *Llandeovally, Crickadern*, and *Broyullis*, whereof she has nothing, as she says, and whereof

Ordered that
L. L. and H. M.
shall sue for the
demandant,
who is an in-
fant, as her
next friends.

Re-summons.

“wherefore he did not keep the day given him, by reason of his essoin, before our justices at *Westminster*, in one month of *Easter* last past, and have there the names of those by whose view you shall do this, and this writ. Witness, *John Lord Eldon*, at *Westminster*, the 9th day of *April*, in the 40th year of our reign.” If the sheriff do not return the writ, the demandant may sue out an *alias grand cape* at the return of the first writ; the form of the entry of the *grand cape* and *alias*, when the tenant makes default at the return of the summons, may be seen in *Rast. 239. a. pl. 4.* But if the sheriff executes the writ, the return is indorsed on it in this form: “By virtue of this writ to me directed, on the 5th day of *April*, in the year within written, I have taken into the hands of our lord the king, by the view of *Oliver Prichott* and *Nicholas Reed*, good and lawful men of my county, the third part of the lands and tenements within mentioned with the appurtenances, as I am within commanded: and I have, by *Thomas Norris*, and *John Sympton*, given notice to the

within mentioned *A. B.* to be and appear before his majesty's justices at *Westminster*, at the time and place within mentioned, as I am also within commanded; summoners of the within named *A. B. Thomas Norris*, and *John Sympton*. *J. W.* esq. sheriff.” If the tenant neglect to appear on the return of the *grand cape*, the demandant is strictly intitled to judgment of seisin and to an award of a writ of inquiry of damages; but if the tenant appear on the return of the *grand cape*, the demandant, instead of insisting upon final judgment against the tenant for his default to the summons, may wave the default, and take an appearance upon the *grand cape*, and so in a *petit cape*. 1 *Salk.* 216, 217. *Staple v. Hayden*, *S. C.* 6 *Mod.* 4. Anciently this waver could only be, where the tenant, at the return of the *grand cape*, waged his law of *non summons*; see *Co. Ent.* 175. b. 176. a. 1 *Brown. Ent.* 202, 203.; but it seems now to be sufficient to say, that the demandant releases the default of appearance on the return of the summons. *Robins. Ent.* 268.

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she complains that the said *Jenkin* deforceth her, and unless he shall do so, then (2) re-summon by good summoners, the said *Jenkin*, that he be before our justices of our great sessions of your county, at *Brecon*, in your county, on *Wednesday* next ensuing, to shew wherefore he has not done it, and wherefore he was not in our court before our justices of our great sessions of your county, on *Monday* in that same sessions in your county, as he was summoned: and have there then the summoners and this writ. Witness Sir *M. Lloyd*, knt. at *Brecon*, the 19th day of *September*, in the 12th year of our reign. Summoners, *John Denn* and *Richard Fenn*. — *John Herbert*, esq. sheriff.

Pleas at *Brecon*, in the county of *Brecon*, before Sir *Marmaduke Lloyd*, knt. and *Walter Rumsey*, esq. justices of our lord the now king of his great sessions of the said county, at the great sessions of our said lord the king of the said county, holden at *Brecon* aforesaid, in the said county, on *Monday* the 19th day of *September*, in the 12th year of the reign of our lord *Charles*, by the grace of God of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith, &c.

Count.

(3) *Breconshire*, to wit. *Sibil William*, widow, who was the

(2) A re-summons is neither necessary nor usual; but it is held that it may be by custom. Com. Dig. Pleader. (2 Y.)

(3) But if the tenant appear upon the summons, or in case of an essoin being cast, upon the adjournment day of the essoin; or if he appear upon the return of the *grand cape*, and the demandant release the default of appearance upon the summons; the demandant must then count. The declaration in this entry is in the usual form, except that the demandant, being an infant, sues by her next friend, instead of attorney; and that it is also sometimes the practice to add after *husband* the words, "by writ of our lord the king of dower whereof she has nothing, &c." But this addition does not seem necessary. If the lands lie in several parishes, it seems the better way to specify the particulars in each parish: as the third part of, &c. in the parish of A. and the third part

of, &c. in the parish of B., &c. The count must demand a *third part* of the whole premises, as a third part of two messuages, 100 acres of land, &c. for if the demand be of *three messuages and 50 acres of land*, it is bad, though three messuages and 50 acres of land are the third part of the whole estate. 3 Lev. 169. *Whelpdale v. Whelpdale*. The word tenement has been held to be of too uncertain and general a description; because in realactions the premises must be described with such precision and certainty as to enable the sheriff to deliver seisin of them to the demandant; but *tenement* is a word which may signify either *houses*, or *lands*, or *any thing else that may be holden*; and a judgment in dower for *tenements* was reversed in the K. B. for that reason, though the tenant confessed the action, and the sheriff had delivered seisin. 2 Ld. Raym. 1384. *Kerry v. Kent*. S. C. 8 Mod. 355. 1 Str. 625. The word tenement was

wife of *Thomas William*, by *Lewis Lloyd* and *Hugh Meredith*, who are admitted by the court of our lord the king here to prosecute for the said *Sibil*, who is within age, as her next friends, demands against *Jenkin William* a third part of the manor of *Crickaderne* and *Rhywe*, and of 14 messuages, two water corn grist mills, 500 acres of land, 60 acres of meadow, 100 acres of pasture, 100 acres of wood, 200 acres of furze and heath, with the appurtenances, and 80 shillings of rent, in *Llandevalley*, *Broyullis*, and *Crickaderne*, as her dower, of the endowment of the said *Thomas*, her late husband, &c.

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(4) And the said *Jenkin*, by *William Watkins* his attorney, Nil dicit.

at that time holden to be also too uncertain in an *ejectment*, and for the same reason. 2 Str. 894. *Goodtitle v. Walton*. 3 Wils. 29. *Goodtitle v. Flood*. But as *ejectments* are under the control of the courts where they are brought, and the lessor of the plaintiff must at his peril shew the premises he has recovered to the sheriff, it was afterwards held that *tenement* was well enough in an *ejectment*. 1 Burr. 623. *Cottingham v. King*. 5 Burr. 2673. *Connor v. West*. 1 Term Rep. 11. *Doe v. Denton*. But the authority of these cases has been overruled in a late case, where an *ejectment* for a messuage and *tenement* was adjudged bad after verdict and judgment was arrested. 1 East, 441. *Doe v. Plowman*. [a] If the count does as usual demand a *third part*, &c. and the lands are of gavelkind tenure, the tenant may aver them to be so, and plead in bar, that by custom the wife is intitled to be endowed of a *moiety*, *dum sola & casta remanserit*, and that she married again; or if the demandant has remained single, it seems it will be equally a good defence to say, that she is entitled to be endowed of a *moiety dum sola*, &c.; for it shall not be in her power to wave her customary

dower, and take a third part at common law, because in that case she would be entitled to retain her dower, although she married again. 1 Leon. 193. *Hunt v. Gilborn's case*. S. C. Cro. Eliz. 121. S. P. Ibid. 825. *Davies v. Selby*. Rob. Ent. 245. Co. Litt. 33. b. Rob. Gavelkind, 179 — 183, Sav. 91.

(4) After the demandant has counted, it is held in many cases that the tenant may pray a view. Co. Ent. 177, a. Rast. Ent. 228. b. 292. b. 239. b. Clift. 299. 3 Lev. 169. *Whelpdale v. Whelpdale*. Ibid. 220. *Barnes v. Rich*; but Dy. 179. a. pl. 41., 2 Inst. 481., 45 Edw. 3. 17. pl. 3. Fitz. View, 55., 2 Lev. 117. *Astmal v. Astmal*, are to the contrary; and it is probable, that the strong inclination of the court would be to discountenance, if not disallow, the plea, being a dilatory; as it necessarily occasions great delay in a demand much favoured in law, and the widow is in the mean time without any support. It is now held that an imparlance is not to be granted in dower. Barnes, 2. *Foster v. Kirkley*. At common law, if the husband died seised of the land, the heir was not entitled to a view, because the law presumed he knew the lands

[a] Where the declaration was for a *messuage and tenement*, the court after verdict gave leave to amend the *postea*

by the judge's notes, and enter the verdict for the *messuage* only. 8 East 357. *Goodtitle d. Wright v. Otway*.

WILLIAM, the heir of WILLIAM, v. GWYN. comes, and says nothing in bar or preclusion of the said *Sibil*, whereby the said *Sibil* remains undefended therein against the said *Jenkin*; judgment that the third part of the manor, tenements, and rent aforesaid with the appurtenances, be taken into the hands of our lord the king, and the day, &c. and

Petit cape.

which his ancestor had at the time of his death. 2 Inst. 481. But if the husband *aliened* the land, the tenant was entitled to a view at the common law; but by statute of Westminster 2. (13 Edw 1.) c. 48. the view is taken away where the husband aliened the lands to the tenant, or his ancestor. Therefore if the tenant in either of these cases demands a view, the demandant may counterplead; and where the counterplea is, because the husband had aliened, the word *alienavit* is proper, being used in the statute. 3 Lev. 220. *Bernes v. Rich.* 3 Lev. 168. *Whelpdale v. Whelpdale.* The form of the plea and counterplea may be seen in Clift. 299. So the tenant may pray a view *before* the count. Cro. Car. 351. *Wickham v. Enfield.* Willes's Rep. 347. *Davis v. Lees.* Issue may be taken on the counterplea, Rast. Ent. 239. b. If the tenant demurs to the counterplea, and it is adjudged against him, the judgment will be peremptory. Com. Dig. Pleader (2 Y. 3). But where the view is granted, the tenant is again entitled to the same essoin as before, and at the return of the view, or the adjournment of the essoin, the demandant must count *de novo*. If the tenant pleads non-tenure, jointenancy, &c. in abatement of part of the demand, the demandant may *abridge* or narrow her demand to the residue, and the writ will remain good; and she may do so though the tenant does not plead in abatement. See post, 330. *Dennis v. Dennis.* Lev. Ent. 76. The rule upon this subject is laid down by *Juzn* chief justice in 14 H. 6. 3, 4. Bro. Abridgment, 12., who said, "that

in all cases where the writ is *de libero tenemento* generally, as in assize and writ of dower, where the writ is "her reasonable dower, which falleth to her of the *freehold* of W. her husband," the demandant may abridge his plaint or demand; and the reason is, "because although he abridges some acres, yet the writ remains true as to the rest, it being *liberum tenementum* still; but in a *præcipe quod reddat*, where a certain number of acres is demanded, the demandant cannot abridge, for he would falsify his writ: and where a writ is acknowledged to be false in part, it must abate in the whole; and even in an *assize de libero tenemento* in A. and B. the plaintiff cannot abridge his demand *as to all* in B., for his writ would be false; and so note the difference." — See stat. 21 H. 8. c. 3. See also 3 Lev. 68. *Chetham v. Sleigh.* Herne, 342. Bro. Abridgment, pl. 2. 10. 17. 18. 28.; but see 19 H. 6. 13. Bro. Abridgment, 32. Com. Dig. Abridgment, (A). Vin. 109. Booth, 290.; at what time the plaint may be abridged. It seems in the nature of a *nolle prosequi* as to part.

There are some pleas which may be pleaded in *abatement*; as ancient *demesne*, 1 Rol. Abr. 322, (E). pl. 2. Rob. Ent. 250. Ash. Ent. 297. which may be pleaded even after a release of the default of appearance to the summons upon the return of the grand cape; or in other words, though the tenant does not appear until the return of the grand cape. 1 Roll. Abr. 324. (H). pl. 1. Or that the demandant married pending the action; see the form of the plea, Co. Ent. 173. b. The plea of *non-*

that he be summoned that he be on *Monday* in the next great sessions, &c. wheresoever, &c. to hear their judgment thereon, &c. At which day here, to wit, at *Brecon* aforesaid, in the county aforesaid, in the next great sessions of our lord the

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tenure either of the whole or part, though usually called a plea in abatement, concluding with praying judgment of the writ, is not strictly a plea in abatement, though a dilatory; for so far from giving the demandant a better writ, the plea is that the tenant is not liable to the action, inasmuch as he does not hold the land in any shape; and, besides, it is frequently pleaded as to part, along with a plea *in bar* to the rest. See the form Rast. Ent. 231. a. b. 232. b. 1 Bro. Ent. 205. Clift. 303. pl. 11. Rob. Ent. 246. 1 Lut. 716, 717. When *non-tenure* is pleaded to part, and the demandant admits the plea, she may abridge her demand to the residue, as we have already observed.

As to *pleas in bar* in this action, they are of two sorts; one denying the right of the demandant to any dower at all; and the other admitting her right, but alleging some excuse for not having assigned it before. Under the former head are included the following among other pleas, as that the demandant's husband made a feoffment of the lands to the tenant, and was afterwards attainted of treason: and a replication that her husband was pardoned will not, it seems, be any answer; for her title begins by her marriage, and must *continue* and be consummated by the death of the husband; but the attainder *interrupts* her title as an elopement by her would have done; and this interruption is not helped by the subsequent

pardon. 1 Leon. 3. *Mayney's case*, 2 Hawk. P.C. c.49. See statute 5 & 6 Edw. 6. c.11. s.13. So the tenant may plead in bar that the demandant's husband was never seised of such an estate in the lands that she can have any legal claim to be endowed of them; as that he was only tenant for life, or donee, in special tail by a former wife; this is usually termed a plea of *ne unques seisie que dower*; see the form of the plea. Rast. Ent. 230. a. Co. Ent. 176. a. Herne, 340. Rob. Ent. 237, 1 Bro. Ent. 203. Clift. 203. pl. 12. Or the tenant may plead the former plea as to part with one or more pleas to the residue. Herne, 340. Rob. Ent. 237, 279. Clift. 303. pl. 13. [b] So the tenant may plead that the demandant and her supposed husband were never accoupled together in lawful matrimony; and if she replies she was married at B. in such a diocese, the court will send a writ to the bishop to certify whether there was a marriage or not; and as the fact is to be tried and determined by his certificate, (see the form as well of the pleadings as of the writ and certificate. Rast. Ent. 228. a. 228. b. Co. Ent. 180. a. b. 181. a. Rob. Ent. 240. 1 Bro. Ent. 204.) therefore it must state positively either that A. and B. were lawfully accoupled together in lawful matrimony, or that they were not so. 9 Rep. 19. b. *Beddingfield's case*. 2d. Towns. Judg. 95, 96. Dy. 368. b. 313. If it state *evidence* only it is insufficient,

[6] But he cannot plead *ne unques seisie que dower*; and also *ne unques accouple*. 2 Bl. Rep. 1157. *Anderson*

v. *Anderson*. Ibid. 1207. *Hillier v. Fletcher*.

WILLIAM, the heir of WILLIAM, v. GWYN. king there, held on *Monday* the 3d day of *April*, in the 13th year of the reign of our lord *Charles*, now king of *England*, &c. before Sir *Marmaduke Lloyd* knight, and *Walter Rumsey* esq. justices of our said lord the king of the great sessions of his

and the court will send another writ to the bishop to make another certificate, 2d. Towns. Judg. 96. If the marriage was solemnized abroad, or in *Scotland*, so that the court cannot send a writ to any bishop, the lawfulness of the marriage must of necessity be tried by a jury, and therefore the replication must conclude to the country, and the issue will be tried in the county where the venue is laid. 2 H. Black. 145. *Ilderton v. Ilderton*. [c] The tenant may also plead that the demandant eloped from her husband, and lived with another person in adultery during the coverture. Rast. Ent. 230. a. 1 Bro. Ent. 204. 2 Bro. Ent. 109. Rob. Ent. 260. To which the demandant may reply either that she did not elope. Rast. 230. a. 2 Bro. Ent. 109. Rob. Ent. 263. Or that she was afterwards reconciled to her husband. Dy. 107. a. 1 Bro. Ent. 204. The tenant may also plead a divorce *a vinculo matrimonii*. Co. Litt. 32. a. Or he may plead a jointure, made by the demandant's husband

on her, before marriage. Co. Ent. 172. a. b. or that it was made after marriage, and the wife agreed to it after her husband's death. Co. Ent. 171. b. 172. a. Rob. Ent. 261. So the tenant may plead that the husband levied a fine, and the demandant made no claim within five years after his death. Co. Ent. 171. a. Clift. 305. to which she may say that she brought her action of dower within five years. Co. Ent. 171. b. Or the tenant may plead that the demandant and her husband levied a fine, or suffered a common recovery of the lands [d]; so the tenant may plead an outstanding term created before the coverture, and pray that the demandant may not have execution before the end of the term. [e] Rob. Ent. 237. Or that there was a demise for years before coverture, and praying that the demandant may be endowed of the reversion and rent. And if the tenant does not plead such term, he cannot set it up afterwards as a prior title to an ejectment, brought by tenant in dower after her recovery to obtain

[c] The demandant cannot reply a sentence in the spiritual court, establishing her marriage, for the question must be tried by the bishop's certificate, and he is the judge how far that sentence is conclusive. 2 Wils. 118. 122. & 127. *Robins v. Crutchley*. But she may reply a former certificate returned by the bishop. Per *Bathurst* J. S. C.

[d] Or the tenant may plead that the demandant's husband is alive. See Com. Dig. Pleader, (2 Y. 9.)

[e] This is a good plea in law: but the demandant may have relief in equity against the heir, or devisee of the hus-

band, or his assignee if he have become bankrupt. 1 P. Wms. 137. *Wray v. Williams*. Prec. in Chan. 151. S. C. Prec. in Chan. 241. *Lord Dudley v. Dudley*. 9 Vin. Abr. 227. *Squire v. Compton*; but not against a purchaser for a valuable consideration, even with notice, if he have taken an assignment of the term to a trustee for himself. Show. Ca. in Par. 69. *Lady Radnor v. Vandebendy*. Prec. in Chan. 65. S. C. Amb. 6. *Swannock v. Lifford*. Butler's Notes to Co. Litt. 208. a. n. 105. ; 7 Ves. jun. 567. *Maundrell v. Maundrell*. 10 Ves. jun. 246. S. C.

said county, comes the said *Sibil*, by her said next friends; and the said *Jenkin* does not come, and the sheriff now testifies the day of the taking, &c. and that he summoned, &c. Therefore it is considered that the said *Sibil* recover her seisin of the third part aforesaid, with the appurtenances, against the said *Jenkin* by default, &c. and the said *Jenkin* in mercy, &c.

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Judgment of
seisin.

possession. 1 Salk. 291. *Lindsey v. Lindsey*.

As to the other sort of pleas in bar, which admit the right of dower, but allege some excuse; the tenant may plead that the demandant detains the deeds and evidences belonging to the estate, and that he was always ready to assign her dower if she would deliver them, &c. Rast. 229. b. [f] If the demandant replies that she is ready to deliver them to the tenant, and brings them into court, judgment is given for her immediately. Rast. 230. a. The demandant may also reply that she does not detain the deeds, &c.; but it is a dangerous replication, for if the jury find it false, she will lose her dower. Hob. 190. *Brickhead v. Archbishop of York*. So the tenant may plead that he has always been and still is ready to render dower, and pray that the demandant may not have damages. Rast. 236. b. 237. a. 1 Bro. Ent. 205. For if the tenant plead it at the return of the summons, that is, of the writ, he will be excused from paying meane profits and damages for the detention of the dower, unless the demandant has requested her dower. Co. Litt. 32. b.; if she has, it must be stated in the replication, and issue may be taken upon

it. Harg. Co. Litt. 33. a. note (1.) 1 Lutw. 717. Therefore as the heir is not bound to assign dower until he be requested, Lord Coke recommends it to the widow, to demand her dower in the presence of witnesses, as soon after her husband's death as she can. Co. Litt. 32. b. If she admits the plea and has judgment, although she will not recover meane profits and damages from the death of her husband until the commencement of the suit, yet she will be entitled to receive them from the commencement of the suit to the award of the writ of inquiry: see the form of the judgment and writ of inquiry, 1 Rich. Pract. C.P. 509. 5. edit. Barnes, 234. *Penrice's case*. [g].

If issue be joined on any plea which denies the right of dower, except *ne unques accouple*, which we have seen, is to be determined by the bishop's certificate, the jury process is the same as in personal actions in the C. B. viz. *a venire facias*, and *a habeas corpora juratorum*; post. 340. *Dennis v. Dennis*. 2 Wils. 121. *Robins v. Crutchley*; and by statute 24 Geo. 2. c. 48. s. 4. it is enacted, "that in all writs of dower *unde nihil habet*, after issue joined, it shall not be needful or requisite to have above 15 days between the teste and

[f] This plea can be pleaded only by the heir; 9 Rep. 16. *Bedingfeld's case*; nor by him in some particular cases, Ibid.; and he must show the certainty of the charters. Ibid.

[g] The tenant may also plead an assignment of other lands by the heir in

full satisfaction of all dower. Co. Litt. 35. a. or an assignment of a rent in lieu of dower, provided that he shows he had such an estate in the land out of which the rent issues, as enables him to grant it. 9 Leon. 10. *Beaumont v. Dean*.

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Demandant
says that her
husband died
seised, and
prays a writ, as
well of seisin,
as of inquiry of
damages.

[45]

Afterwards, to wit, on the said *Monday*, the 3d day of *April*, the said *Sibil*, by her said next friends, says that the said *Thomas* her late husband, &c. died seised of the manor, tenements, and rent aforesaid with the appurtenances, and prays a writ of our said lord the king, as well to have full seisin given her of the third part aforesaid with the appurtenances, as to enquire of the damages, &c. and it is granted to her returnable here at *Brecon*, in the said county, on *Tuesday* next ensuing, &c. At which day here, to wit, at *Brecon* aforesaid, in the county aforesaid, &c. before the said justices, &c.

return of the *venire facias*, or any other process to be sued out for the trial of the said issue, but that the writ of *venire facias* and other process, after issue joined until judgment be given, having only 15 days between the teste and return thereof, shall be good and effectual in law as is used in personal actions."

At the common law there were no damages in dower; but by statute of Merton, 20 H. 3. c. 1., it is enacted, "that if a widow shall recover her dower of the lands *whereof her husband died seised*, the tenant shall yield damages, that is to say, the value of the dower from the time of the death of her husband until the day she shall have judgment to recover seisin;" and by the statute of Gloucester, 6 Edw. 1. c. 1. which gives costs in all cases where the party is entitled to damages, costs are given in this action. If the jury find a verdict for the demandant, they ought also to find, 1. that her husband *died seised*, and also of what estate, and the time of his death, to intitle her to mesne profits and damages for detaining her dower under the statute of Merton; 2. the annual value of the land; 3. they must assess the damages on account of the detention of her dower; and 4. costs. Co. Lit. 33. a. Post. 331. *Dennis v. Dennis*. And the demandant has thereupon judgment to recover seisin of a third part of the tenements in demand

in severalty, by metes and bounds, and the mesne profits and damages. See the form 2d Towns. Judg. 102. pl. 25, 26. Post, 331, 332. But if the jury omit to find either the whole or any part thereof, the omission may be supplied by a writ of enquiry. 1 Leon. 92. *Butler and Ayres'* case. 2d Towns. Judg. 114. pl. 31. 111. pl. 46. As where the jury find that the husband died seised, but omit the rest, a writ of inquiry may be awarded to supply the omission. 2d Towns. Judg. 100, 101. pl. 22, 23. So where the jury neglect to find damages for the detention of the dower and costs. Ibid. 102. pl. 24. Or the demandant may remit the value and damages, Ibid. 100. pl. 21.; and as damages and costs are added by statute, to the judgment given by the common law to recover seisin, the judgment as to the latter may be affirmed in a writ of error, and the judgment for the damages reversed, because they are distinct in their nature; and a writ of error lies after judgment in seisin, and before judgment for damages. 1 Lev. 38. *Aleworth v. Roberts*. Harg. Co. Lit. 32. b. note (4). And upon this principle it seems to be, that where there is judgment to recover seisin either by default, or upon verdict, where the jury have neglected to find any thing else, and the writ of seisin is executed, and the tenant dies before there is any judgment for the value and damages, the

comes the said *Sibil*, by her next friends, &c. and the sheriff, to wit, Sir *William Lewis*, bart. now returns that, by virtue of the said writ, on the 5th. day of *April*, in the 13th year aforesaid, he caused the said *Sibil* to have full seisin of the

WILLIAM,
the heir of
WILLIAM,
DE GWYN.

demandant cannot have a *scire facias* either against the heir or terre-tenants, for the purpose of suing out a writ of inquiry of such value and damages; because when the tenant dies before judgment given for them, it remains a judgment at common law. 1 Lev. 38. *Aleworth v. Roberts*. S. C. 1 Sid. 188. S. C. cited 3 Lev. 275. *Mordant v. Thorold*. So where the demandant dies after judgment of seisin, but before the execution of a writ of inquiry for the value and damages, her personal representative shall not have a *scire facias* for the value and damages. 1 Salk. 251. *Mordant v. Thorold*. S. C. 3 Lev. 275.

In the present case there ought to have been judgment of seisin without an award of a *grand* or *petit cape*; the former process, which it seems to be, is erroneous, because it never lies after an appearance in chief by the tenant, as in this case; the latter is equally erroneous, because the *nilhil dicit*, or default is in the same sessions or term which the tenant appeared in. 1 Bro. Ent. 202. 204. Post, 46. Indeed if the default be in a term subsequent to the appearance a *petit cape* must issue. Post, 46. *Herne*, 332, 333. Ibid. 339. Rob. Ent. 243. There seems to be no difference in the form of a *grand* or *petit cape*, except that the words "and the day, &c." are omitted in the latter. The form of the entry, it seems, should have been after the words "*therein against the said Jenkin, undefended*;" thus, "Therefore it is considered that the said C. D. recover, against the said A. B., her seisin of the third part above demanded, with the appurtenances, to be held by her in severalty

" by metes and bounds, and the said
" A. B. in mercy, &c. And thereup-
" on the said C. D. says, that J. D. her
" late husband, on, &c. died seised of
" the tenements aforesaid, with the ap-
" purtenances, in his demesne as of
" fee, and prays a writ of our said lord
" the king, to be directed to the sheriff
" of the said county of *Brecon*, as well
" to give her full seisin of the third
" part aforesaid, with the appurte-
" nances to be held by her in severalty
" by metes and bounds, as to inquire of
" the damages: and it is granted to her
" returnable here on, &c. At which
" day here comes the said C. D. by
" her said attorney, and the said sheriff,
" to wit, J. W. esq. now returns, that
" he by virtue of the said writ to him
" directed, on the day of last
" past, did cause the said C. D. to have
" full seisin of the third part of the te-
" nements aforesaid with the appurte-
" nances, that is to say, of one mes-
" suage, &c." (here describe the pre-
" mises delivered by the sheriff to the de-
" mandant, and in whose occupation they
" are according to the description in the
" recital,) "to hold the same to the said
" C. D. in severalty, by metes and
" bounds, for and in the name of the
" whole dowry of the said C. D. of the
" tenements aforesaid with the appur-
" tenances, happening to her by the
" death of the said J. D. her late hus-
" band, as by the said writ he was com-
" manded, &c. The said sheriff also
" returns here a certain inquisition
" taken before him, at the house of
" at S. in the said county, the
" day of last past, by
" the oath of twelve, &c. by virtue of
" the writ aforesaid taken, by which it

WILLIAM, third part of the manor, tenements, and rent aforesaid, with
 the heir of the appurtenances, that is to say, of 8 messuages, 1 mill,
WILLIAM, 100 acres of land, 6 acres of meadow, 20 acres of pasture;
 v. **GWYN.** and 10 acres of wood, with the appurtenances, called and

“ is found, that the said J. D. hereto-
 “ fore the husband of the said C. D. in
 “ the said writ named, on the
 “ day of in the year of our
 “ Lord died seised of and in
 “ the said tenements with the appur-
 “ tenances, in the said writ specified in
 “ his demesne as of fee, and that the
 “ said tenements with the appurte-
 “ nances, are of the clear yearly value
 “ in all issues beyond reprises of 300*l.*,
 “ and that three years are elapsed
 “ from the death of the said J. D.
 “ until the suing out of the said in-
 “ quisition, and that the said C. D. has
 “ sustained damages by reason of the
 “ detaining of the said dower, beyond
 “ the value aforesaid, and also over
 “ and above her costs and charges by
 “ her about her suit in this behalf ex-
 “ pended, to 80*l.* and for those costs
 “ and charges to 40 shillings. There-
 “ fore it is considered, that the said C. D.
 “ recover against the said A. B. as well
 “ the value of the third part of the
 “ tenements aforesaid with the appurte-
 “ nances, from the time of the death of
 “ the said J. D. her late husband, until
 “ the suing out of the said inquisition,
 “ which said value amounts to 300*l.* as
 “ her damages aforesaid to 82*l.* by the
 “ inquisition aforesaid, in form aforesaid
 “ found, and also 100*l.* 10*s.* by the court
 “ here adjudged of increase to the said
 “ C. D. at her request, for her costs
 “ and charges aforesaid, which said va-
 “ lue and damages in the whole amount
 “ to 482*l.* 10*s.*” &c. 1 Rich. Pract.
 C. P. 409. 5th edit. It seems necessary
 to serve the tenant with a notice of ex-
 ecuting the writ of inquiry; for though
 personal notice is not necessary to be
 given in real actions, but the tenant

ought to take notice, because the writs,
 namely, the summons, &c. are always
 executed upon the land, and not else-
 where; yet by the judgment to recover
 seisin the suit is at an end at common
 law, and the damages for the value of
 the land are added by the statute of
 Merton, 20 H. 3. c. 1. and sound in da-
 mages only; therefore notice must be
 given of executing the writ of inquiry
 in this as in other cases of writs of in-
 quiry; and if it be not, the court will
 set aside the inquisition, and order the
 money levied under it to be restored to
 the tenant. 3. Lev. 409. *Perkins v.*
Lambe. The writs of seisin and of in-
 quiry of damages are now generally
 blended together in the same writ,
 which may be in this form; “ *George*
 “ the Third, &c. know you, that C. D.
 “ who was the wife of J. D. has in our
 “ court, before our justices at *West-*
 “ *minster*, by the judgment and consi-
 “ deration of the said court, recovered
 “ by our writ of dower, *unde nihil habet*
 “ against A. B. a third part of two mes-
 “ suages, 100 acres of land, 10 acres
 “ meadow, and 5 acres of wood, with
 “ the appurtenances, in the parish of
 “ E. in your county, as her dower, of
 “ the endowment of J. D. late her
 “ husband, by the default of him the
 “ said A. B.; we therefore command
 “ you, that without delay you give the
 “ said C. D. full seisin of the third part
 “ above demanded with the appurte-
 “ nances, to be held by her in severalty
 “ by metes and bounds; and in what
 “ manner you shall execute this writ,
 “ make known to our justices at *West-*
 “ *minster* in 15 days of *Easter* now next
 “ ensuing; we also command you, that
 “ by the oath of good and lawful men

known by the several names of *Tyrallan-issa*, *Tyr-yllan-yrba*, *Tyrillan* and *Tye-my*, in *Llandeulley*, in the said county, and of 2 messuages, 30 acres of land, 6 acres of meadow, 10 acres of pasture, and 10 acres of wood, with the appurtenances, in

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“ of your county, you diligently inquire
“ whether the said J. D. died seised in
“ his demesne as of fee (or of fee tail)
“ of and in the said two messuages,
“ 100 acres of land, 10 acres of mea-
“ dow, and 5 acres of wood, with the
“ appurtenances, in the parish of E.
“ aforesaid; and if by the said inquisi-
“ tion you shall find that he died so
“ seised, then you will inquire what is
“ the clear yearly value of the said te-
“ nements with the appurtenances, in
“ all issues beyond reprises; and how
“ much time has elapsed since the death
“ of the said J. D.; and also what da-
“ mages the said C. D. has sustained by
“ reason of the detaining of the said
“ dower; and the inquisition which you
“ shall make in the premises you cer-
“ tify to our justices at *Westminster*,
“ on the day above mentioned, under
“ your seal, and the seal of those by
“ whose oath you shall make the said
“ inquisition, and this writ. Witness,
“ &c.” When the sheriff has executed
this writ of seisin, the demandant must
bring an *ejectment* to get into posses-
sion [h].

Having thus considered the writ of

dower *unde nihil habet*, it may not per-
haps be improper to take some notice
in the next place of another real action,
which of late years is become not an
uncommon one, I mean, a writ of
right. Although much is said in the
books of commencing this action at first
in the court baron, and removing it
afterwards into the county court by the
writ of *tolt*, and from thence into the
common pleas by the writ of *pone*, yet,
it seems, this circuitous method is very
unnecessary, and only tends to create
confusion; for it is held to be the most
usual and safe way for the demandant to
sue out the writ returnable immediately
into the common pleas. Booth, 91.
This is generally called a writ of *right close* “*Quia dominus remisit curiam*,”
but these words are not now added after
the teste of the writ, as used to be the
practice formerly, because the lord’s
licence is not material or traversable,
and the recovery in the action in the
common pleas is as valid without such
licence as with it. F. N. B. 5. F. 6. B.
7th edit. This action was never com-
menced in the court baron for lands
holden of *the king in chief*; but the writ

[h] If the tenant be within age the
parol shall not demur, because of the
mischiefs that might ensue if the de-
mandant, claiming only a life estate,
should die during the non-age of the
tenant and lose the estate. Cro.
Eliz. 309. *Gore v. Perdue*. Cro. Jac. 111.
Smith v. Smith. Ibid. 392. *Herbert v.*
Binton. If excessive dower be assigned
by the sheriff, the heir shall have a
scire facias to obtain an assignment *de*
novo: or if the heir, being under age,

or his guardian have assigned excessive
dower, the heir on attaining his age shall
have relief by writ of *admeasurement*:
but if the heir being of full age assign
excessive dower, he is without relief at
law. 1 Taunt. 412. *Stoughton v. Leigh*.
The widow may, if she please, accept
an assignment of dower not by metes
and bounds, and it will be a good as-
signment to all intents and purposes.
2 N. R. 1. *Rowe v. Power*.

WILLIAM, the heir of WILLIAM, v. GWYN. *Llandeulley* aforesaid, now or late in the tenure or occupation of *Henry John Madock*, and of 6 acres of meadow, 3 acres of pasture, and three acres of wood, with the appurtenances, in *Llandeulley* aforesaid, late in the tenure or occupation of

was directed to the sheriff of the county returnable into the common pleas; and hence it is, that in some writs are inserted the words "*which he (the demandant) holds of us in chief;*" without regarding the truth or falsehood of them; but this insertion seems to be as unnecessary as the former, and is now for the most part omitted: and therefore Mr. Serjt. *Wilson* is mistaken in calling the writ of right in *Tyssen v. Clarke*, 3 Wils. 419. 541. 558. a writ of *right patent*, for it was a writ of *right close*. This writ can only be brought by tenant in fee-simple against the tenant of the freehold at the least. F. N. B. 3. E. 7th edit. But joining a stranger with a tenant does no hurt, it being mere surplusage. Salk. 571. *Page v. Hayward*. If the action be upon the demandant's own seisin, it must be brought within 30 years; if upon the seisin of his ancestor, within 60 years after the right has accrued, by the statute of limitations, 32 H. 8. c. 2. s. 1. 3. 1 Bulf. 162. *Herne v. Lilborne*.

When an action is meant to be brought, the first step is to make out a *præcipe* for the writ in this form: "*Berkshire*, to wit, *Command Elizabeth Druce* widow, that justly and without delay she render to *Thomas Dee* and *Ann* his wife, 4 messuages, 4 gardens, and 4 acres of land, with the appurtenances, in the parish of *Thatcham* in *Berkshire*, which they claim to be the right and inheritance of the said *Ann*. Returnable in 8 days of *St. Hilary*." Accordingly the cursitor makes out the writ, the form of which may be seen, 3. Wils. 558. *Tyssen v. Clarke*. After suing out the original, the next step is to have the tenant summoned; the

summons ought regularly to be upon the land; but in truth no actual summons is made either in this or any other real action, though the names of summoners are of course returned by the sheriff upon the writ. The statute 31 Eliz. c. 3. s. 2. requires proclamation to be made in this action, as, we have already seen, it does in dower; therefore the sheriff on receipt of the writ makes out his warrant to his bailiff to summon the tenant and make proclamation; the bailiff makes his return to the sheriff, and he indorses his return on the writ in the same manner, *mutatis mutandis*, as we have already shown in the writ of dower; see ante, 43. a. note (1). The summons must be served 15 days before the day of the return of the writ, otherwise the tenant may wage his law of non-summons; and 15 days before the 4th day after the return will not serve. Booth, 24. 3 Wils. 558. On the 4th day after the return of the writ, the tenant may enter an essoin with the clerk of the essoins, but it must be in person and not by attorney; the essoin must then be adjourned by the demandant, who will otherwise be non-prossed, if the tenant enters a *ne recipiatur* with such clerk, and gives a rule to the demandant to adjourn the essoin. Booth, 92. The day of the adjournment of the essoin is to the 4th return, both inclusive, by statute 24 Geo. 2. c. 48. When the action is brought against joint-tenants, coparceners, or tenants in common, each of them is entitled to one essoin; and if one only enters an essoin, a continuance by *dies datus* is given to the others until the adjournment day of that essoin, and the same thing is done alternately until each has

Lawrence Boys, and of and in 10 acres of pasture, with the appurtenances, called *Tir-y-Kilbache* in *Llandeovalley* aforesaid, in the county aforesaid, to be holden by the said *Sibyl*, as her dower of the said tenements, with the appurtenances, in

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had his essoin; as where the action is against A. B. and C. A. enters an essoin, B. and C. appear, a day is given to them to the adjournment day of A's essoin; on that day B. enters an essoin. A. and C. appear, a day is given to them to the adjournment day of B.'s essoin; on that day C. enters an essoin, A. and B. appear, a day is given to them to the adjournment day of C.'s essoin, (for an essoin is allowed in this action both before and after appearance,) therefore if the writ were returnable on the morrow of *All Souls*, the adjournment day of the last essoin would not be until three weeks after *Easter*. At the common law A. was entitled to another essoin on the adjournment day of C.'s essoin, and B. and C. had a right to be again successively essoined, as before, *simul et vicissim*, or, as it was usually called, *fourroher per essoign*, to the great delay and vexation of the demandant; but this mischief was remedied as to joint-tenants, coparceners, and tenants in common by the statute of Westminster I. (3 Edw. I.) c. 43. and as to husband and wife, seised in the right of the wife, by the statute of Gloucester (6 Edw. I.) c. 10. If the tenant does not put in his essoin on the 4th day after the return of the writ, the demandant may on the following day enter a *ne recipiatur*; if however he neglects to do so, the tenant may enter his essoin at any time after, for, it seems, the clerk of the essoins cannot refuse to receive the essoin, unless a *ne recipiatur* be entered. But if the tenant do not appear either on the 4th day after the return of the writ, or on the adjournment day of the essoin, when an essoin has been entered, the demandant may sue out

the writ of *grand cape* against him, the form of which is the same, *mutatis mutandis*, as has been already given when we treated of the writ of dower, ante, note (1); and see also 3 Wils. 558. The return to which writ is also in the same form, *mutatis mutandis*, as the return to the *grand cape* in dower, above set forth, ante, note (1). The lands must be taken into the king's hands, that is, the writ must be executed by service on the tenant, 15 days at least before the return of the writ, for the sheriff does not actually seize the lands and turn out the tenant, though the return imports it. Booth, 22. If the tenant do not appear on the return of the *grand cape*, and plead something to excuse his default, strictly speaking the land is lost for ever; but if he do appear, the demandant may release the default of not appearing at the return of the summons; and it is the usual practice to do so. Where the *grand cape* is not returned, there may be an *alias* and *pluries*. Ib. 23.

When the tenant appears either at the return of the writ, or on the adjournment day of the essoin, or on the return of the *grand cape*, he may, if he thinks proper, pray a view *before* the demandant has counted; Willes's Rep. 344. *Davis v. Lees*; but if he does not, then the next step is the *count*, which is in this form, if the demandant counts of *his own seisin*: "*Berkshire* "to wit, *Thomas Dee* and *Ann* his "wife, by *James Hore* their attorney, "demand against *Elizabeth Druce* "widow, four messuages, four gardens, "and four acres of land with the appurtenances, in the parish of *Thatch-* "am in the county of *Berks*, which they

WILLIAM, severalty by metes and bounds, according to the exigence of
 the heir of the said writ: and as to the inquiry of damages the sheriff
 WILLIAM, has done nothing thereon.
 v. GWYN.

Roll of warrants of attorney received before Sir Marm-

"the said *Thomas* and *Ann* claim to
 "be the right and inheritance of her
 "the said *Ann*, by writ of our said lord
 "the king of right; and whereupon
 "they say that they themselves were
 "seised of the tenements aforesaid
 "with the appurtenances in their de-
 "mesne as of fee and right, in right
 "of her the said *Ann*, in the time
 "of peace, in the time of our pre-
 "sent sovereign lord the king, to
 "wit, within 30 years last past (Cro.
 "Jac. 293. *Lilburne v. Heron*. S. C.
 "1 Bulst. 162. Yelv. 211.) by taking
 "the esplees thereof to the value,
 "&c. and that such is their right
 "they offer, &c." but if he counts
 "of the seisin of his ancestor, then the
 "form is, "And whereupon they say
 "that R. C. deceased, whose heir she
 "the said *Ann* is, was seised of the
 "tenements aforesaid with the appur-
 "tenances in his demesne as of fee
 "and right, in the time of peace,
 "in the time of the lord *George* the
 "2d late king of *Great Britain*, to
 "wit, within 60 years now last past,
 "by taking the esplees and profits
 "thereof to the value, &c. and from
 "him the said R. C. because he died
 "without issue, the right of the tene-
 "ments aforesaid with the appurte-
 "nances descended to E. C. his brother
 "and heir; and from the said E. C. the
 "right of the tenements aforesaid with
 "the appurtenances descended to M. C.
 "son and heir of the said E. C. and
 "from the said M. C. the son, the right
 "of the same tenements with the ap-
 "purtenances descended to the said
 "*Ann*, daughter and heir of the said
 "E. C. and wife of the said *Thomas*
 "*Dee*, who now demand the same, and

"that such is their right they offer,
 "&c." It is necessary to state in the
 "count, that the ancestor from whom the
 "demandant derives title was seised of
 "the premises in right, as well as in his
 "demesne as of fee. 5 East, 272. *Dow-*
 "*land v. Slade*. It is an established rule,
 "that in all real actions brought by an
 "heir on the seisin of his ancestor, the
 "demandant must show how he is heir;
 "it is not enough to say he is heir to
 "such a one generally, but he must set
 "forth specially in what manner and how
 "he is heir; and that too with accuracy
 "and correctness, otherwise it will be
 "bad on demurrer, or after judgment
 "for the demandant by default or on
 "demurrer. As where in a writ of false
 "judgment, on a judgment by default
 "for the demandant in a writ of right
 "close in a court baron, the demandant
 "in his count alleged a seisin in fee in
 "one *Thomas Gamlyn*, and that from
 "him the right to the premises descended
 "and came to one *William Gamlyn*, as
 "brother and heir of the said *Thomas*
 "*Gamlyn*, and from the same *William*
 "*Gamlyn* the right descended on one
 "*Hannah Dowland*, as eldest cousin and
 "heir of the said *William Gamlyn*, that
 "is to say, as eldest daughter and heir
 "of one *Hannah Ball*, who was the only
 "sister and heir of one *Henry Gamlyn*,
 "who was the father as well of the said
 "*Thomas Gamlyn* (the ancestor who died
 "seised), as of the said *William Gamlyn*.
 "One of the errors assigned was in sub-
 "stance, that there was a repugnancy
 "and contradiction in stating *Hannah*
 "*Ball* to be the sister and heir of *Henry*
 "*Gamlyn*; because it appeared by the
 "count that *Henry* died, leaving his son
 "*William Gamlyn* who was his heir, and

duke Lloyd, knt. and Walter Rumsey, esq. justices of our lord the king of his great sessions of the county of Brecon, in the great sessions of our said lord the king, of the said county, holden at Brecon in the said county, on Monday the 19th day

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that William survived Hannah Ball; therefore she could not by any possibility, according to the demandant's own stating, have been the heir of her brother Henry. It was argued that the court might reject the word *heir* as surplusage, and a precedent in Herne, 502. b. ed. 1657., *formedon in reverter* was cited, where the same inaccuracy appeared, and no objection taken to it. But the court held the error a fatal one, and said it was clear, that if the title be not accurately deduced through a series of ancestors properly described, the demandant must fail. 2 Bos. & Pull. 570. *Slade v. Dowland*, and this judgment was affirmed in the king's bench, 5 East, 272. It is an established rule in the common pleas not to suffer the demandant to amend the count or to discontinue the action. 1 Bos. & Pull. New. Rep. 64. *Charlwood v. Morgan*. 3 Bos. & Pull. 459. *Dumdsay v. Hughes*. *Maidment v. Jukes*, C. B. E. 47 Geo. 3. 2 N. R. 229. [i] So in order to maintain this action, the

demandant must shew an actual seisin either in himself or *his ancestor* by taking the esplees or profits of the land; therefore it is held that a purchaser cannot maintain the action unless upon *his own seisin*, and that the seisin of the person from whom the demandant purchased is not of any avail; Co. Lit. 293. a.; for seisin in the ancestor necessarily means seisin in a person from whom there is a *descent*. Thus where the demandant claimed as heir to a devisee in fee in remainder who took by purchase, and died before the determination of the particular estates for lives, upon which his remainder was expectant, so that he was never *seised* of the lands, and upon his death the remainder descended upon the demandant as his heir, who brought a writ of right; it was held that he could not support the action, because there was not any seisin either in himself or his ancestor the devisee by taking the esplees. 1 H. Black. Rep. 1. *Dally v. King*. [k] Or the tenant may demand

[i] N. R. 233. *Baylis v. Manning*. S. P. So the court refused to amend the disseisor's name in a writ of entry *sur disseisin en le post*; 4 Taunt. 572. *Hull v. Blake*; but permitted a declaration on a writ of partition to be amended by striking out an erroneous description of the quality of the estates conveyed to the different parties. 6 Taunt. 193. *Baker v. Daniel*. 1 Marsh. 557. S. C.

[k] But if the ancestor was seised by taking the esplees as particular tenant, it is sufficient to enable the heir to count on his seisin; provided that the ancestor at the time when he so took

the esplees had in himself the fee in reversion or remainder; Co. Litt. 281. a.; and so note a diversity between a seisin to cause *possessio fratris*, and a seisin to maintain a writ of right. Ibid. There is one exception to the above rule that a purchaser cannot count unless upon his own seisin, viz. that of the assignee of a bankrupt; for though a right to a real action cannot at common law be assigned any more than a right to a personal action, yet the policy of the bankrupt laws transfers both the one and the other. 2 H. Bl. 444. *Smith v. Coffin*.

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of September, in the 12th year of the reign of our lord Charles, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c.

Breconsire, to wit, *Jenkin William* puts in his place *William Watkins* against *Sibil William* in a plea of dower, warrant of attorney for tenant; the demandant as aforesaid, is within age, Therefore, &c.

a view after the demandant has counted, and indeed after a general imparlance; though Dyer, 210. b. states to the contrary, but the prothonotary and clerks held he might. Willes's Rep. 345. *Davis v. Lees*. The reason of which seems to be, that he may ascertain the lands which are demanded, *quod certares in judicium posset deduci*. Booth, 37. When a view is demanded and granted, a writ of view is sued out by the demandant for his own expedition, inasmuch as he is to shew the lands to the sheriff to enable him to shew them to the tenant; and the sheriff must give notice to the tenant and viewers of the time when the view is to be taken. Booth, 40. The form of demanding a view may be thus, "And the said *Elizabeth Druce* by *R. C. Smith*, her attorney, comes and defends her right when, &c. and demands a view of the tenements aforesaid with the appurtenances, and she has it, &c. a day is given to the said parties here until, &c. and in the mean time, &c." And the writ of view may be in this form, "*George the third*, &c. We command you that without delay you cause *Elizabeth Druce* widow, to have a view of four messuages, four gar- dens, and four acres of land with the appurtenances in the parish of *Thatcham*, which *Thomas Dee* and *Ann* his wife, in our court before our Justices at *Westminster*, claim to be the right and inheritance of the said *Ann*, against the said *Elizabeth Druce*, by our writ of right, and appoint four

"knights of those who shall be present at that view, that they be before our Justices at *Westminster*! (on such a day) to testify such view, and have there the names of the knights and this writ. Witness Sir *James Eyre*, knt. at *Westminster*, &c." The return whereof may be thus: "By virtue of this writ, I humbly certify to the justices within named, that I caused *Elizabeth Druce* widow, in the writ within named, to have a view of the tenements aforesaid with the appurtenances within specified, in the presence of A. B. &c. (naming them) four knights of my county who were present at that view; and I have summoned the said knights to appear before the justices within named, at the day and place in the said writ within specified to testify the said view, as within I am commanded — C. D. sheriff." The sheriff may likewise return that, neither the tenant, nor any person for him, came to take the view; or that no person came on the part of the demandant to shew him the land: in the former case, the tenant loses the benefit of a view, in the latter an alias writ of view must be sued out. Booth, 40. Upon the return of the writ of view, the tenant is entitled to another essoin, which is, as we have seen, in four returns both inclusive after the return, and the demandant must count *de novo* by a *similis narratio*; so that in this case, the first count seems to be to very little purpose. Willes's Rep. 345. *Davis v. Lees*. Booth, 42. The tenant must ap-

pear at the day given by the essoin after the view, and may imparl to some return day or any other day in term which the court shall fix. The exceptions specified in the before mentioned statute of Westminster 2. (13 Edw. 1.) c. 48. (which see,) are held not to be all the cases wherein a view ought to be denied, but they are for example's sake; and the true rule is that a view, being a dilatory, shall not be granted unless where a view is necessary; whenever therefore it is plain that the tenant has sufficient knowledge what it is that the demandant sues for, there a view shall not be granted; as for instance, where a church is demanded, called by the name of a particular saint, and lying in such a vill, and the tenant says there are two churches in that vill, and therefore demands a view, the demandant says by way of counterplea, that there is but one church of that name in the vill; this was holden a good counterplea, and the view was denied by the court. But it is no bar to a view to counterplead that the tenant is in actual possession of the lands demanded, without adding, "and of no other lands in the same vill," &c. Willes's Rep. 347. *Davis v. Lees*.

If the tenant be seised only for life, he ought to pray him in the reversion, or remainder, in tail or in fee, *in aid* to defend the inheritance of the land; and if he do not, it seems strictly to be a forfeiture of his estate. The entry of the aid prayer may be thus, "And the said *Elizabeth Druce*, by *R. C. Smith* her attorney, comes and says, that, before the day of suing forth the original writ of them the said *Thomas Dee* and *Ann* his wife, one *A. M.* gent. was seised of the tenements aforesaid with the appurtenances in his demesne as of fee; and being so thereof seised, he the said *A. M.* afterwards, to wit, on the 12th day of *April* in the year of our lord 1779

" at the parish aforesaid, duly made his last will and testament in writing, and thereby gave and devised the tenements aforesaid with the appurtenances to the said *Elizabeth* for the term of her life, the remainder thereof after the death of her the said *Elizabeth* to *H. M.* and his heirs for ever; and afterwards, and before the day of suing forth the said original writ the said *A. M.* at the parish aforesaid died in form aforesaid seised of the tenements aforesaid with the appurtenances; after whose death she the said *Elizabeth* entered into the tenements aforesaid with the appurtenances, and was seised thereof in her demesne as of freehold for the term of her natural life, the remainder thereof after her death in form aforesaid belonging to the said *H. M.* and his heirs; and so she the said *Elizabeth* says that she holds, and on the day of suing forth the original writ of the said *Thomas* and *Ann* did hold, the tenements aforesaid with the appurtenances for the term of her life, the remainder thereof to the said *H. M.* and his heirs for ever, without whom she the said *Elizabeth* cannot bring the tenements aforesaid with the appurtenances into plea, nor answer the said *Thomas* and *Ann* thereof, and she prays aid of him the said *H. M.*; and it is granted to her, &c. Therefore the sheriff is commanded that he summon by good summoners the said *H. M.*; that he be here from the day of *Easter* in 15 days, to join together with the said *Elizabeth* in answering the said *Thomas* and *Ann* in the plea aforesaid if, &c.: the same day is given to the parties aforesaid here, &c." Co. Ent. 49. a. 182. b. 327. a b. 341. a Upon this demand and grant of aid, a judicial writ, called a *summoneas ad jungendum auxilium*, is sued out by the

tenant, and if the prayee, that is, the person whose aid is requested, make two defaults, judgment is given that the tenant shall answer to the demandant without aid. Booth, 61. 2 Bos. & Pull. 386. *Onslow v. Smith*. The *summons ad jungendum auxilium* may be in this form, "George the third, &c. whereas "Thomas Dee and Ann his wife, in our "court before our justices at Westminster, demanded against Elizabeth Druce "widow, four messuages, four gardens, "and four acres of land with the appurtenances, in the parish of Thatcham; "as the right and inheritance of her "the said Ann by our writ of right, as "it is said, and the said Elizabeth afterwards came into our court and "said, that she was seised of the tenements aforesaid with the appurtenances in her demesne as of freehold "for the term of her life only, the remainder thereof belonging to H. M. "and his heirs for ever, and she prayed "aid of him the said H. M., which "was granted to her, therefore we "command you that you summon by "good summoners the said H. M. that "he be before our justices at Westminster "from the day of Easter in 15 days to "answer together with the said Elizabeth, the said Thomas Dee and Ann "his wife in the aforesaid plea, if he "will and have there the summoners "and this writ." The prayee in aid at the return of the summons, or on the adjournment day of the esoin, which he is entitled to, may join in aid and either vouch to warranty, or plead something in bar, or join the mise upon the mere right, "whether the said "Elizabeth Druce widow hath greater

"right to hold the tenements aforesaid. "with the appurtenances for the term "of her life, as she now holds the same, "the reversion thereof after the death "of her the said Elizabeth in form aforesaid belonging to the said H. M. and "his heirs; or whether the said Thomas "Dee and Ann his wife have title to "hold the said tenements with the appurtenances as they have above demanded the same, and the said Thomas "Dee and Ann his wife likewise." Co. Ent. 182, 183. The judgment when the prayee in aid makes default upon the return of the *alias* summons *ad jungendum auxilium*, is entered in this manner, "At which day before our lord the "king at Westminster come as well the "said Thomas and Ann, as the said "Elizabeth by their said attornies; and "the said H. M. (the prayee in aid) "though summoned as before, and "solemnly called, came not, therefore "it is considered that the said Elizabeth "answer the said Thomas and Ann the "said count without the said H. M." Rast. 27. a. As aid prayer is a dilatory plea, it must be verified by affidavit under the statute 4 Ann. c. 16. s. 11. which extends to all dilatory pleas, as well in criminal as civil cases; and if it be pleaded in another term after a general imparlance, it is bad and may be demurred to; and on such demurrer the court will give judgment that the tenant answer alone. 2 Bos. & Pull. 384. *Onslow v. Smith*. The demandant may counterplead the truth of the aid prayer, as that the prayee has nothing in the reversion or remainder, or that the prayee did not demise the land to the tenant. Rast. 27. a. [1] There are two sorts of

[1] And if judgment be given against the tenant, upon an issue in fact on the counterplea, it seems that it shall be peremptory and final: *secus*, if there be a demurrer to the aid-prayer and judgment for the demandant. In this re-

spect as well as many others, as is observed by the learned reporters in the note to 2 Bos. & Pull. 389., the plea of aid-prayer resembles a plea in abatement. See post, 211. notes (2) & (3).

trial now in use in this action; 1., by the grand assize, and 2. by a common jury of twelve upon a collateral point.

1. The grand assize is a jury of twelve joined to four knights, who choose the twelve, to try the mere right between the demandant and the tenant, and it is called *joining the mise upon the mere right*, which is equivalent to joining issue in other actions. The reason of its being called the mere right seems to be, because the *right of property* to the land is only put in issue, without any regard to the *right of possession*; for the tenant may possibly have come unlawfully to the possession, and yet have a good right to the land, and *vice versa*: and the grand assize must find according to the *right of property*. Booth, 95. The manner of the tenant's putting himself upon the grand assize may be seen in 3 Wils. 561. *Tyuen v. Clark*. When the mise is joined, the first process is a writ of summons of four knights to appear and choose the grand assize. See the form of the writ and return. 3 Wils. 559, 560. This writ, if the action is to be tried at the assizes, must be in the alternative, to summon the four knights into bank, or at the assizes, if the judges come thither before the day in bank, in this manner: "that they be before our justices on the morrow of *All Souls*, or before our justices assigned to take the assizes in and for your county, if they shall first come on *Monday* the first day of *July* next at *Abingdon* in your

county, according to the forms of the statute in such case made and provided:" for if the writ be to summon them into bank with a clause of *nisi prius* therein, namely, "*unless the justices of assize shall first come on, &c. at Abingdon to hold the assizes,*" it is bad and will be quashed; because that would only be a conditional writ to summon the knights into bank unless the justices of assize come to *Abingdon* before the day in bank; but if they *do* come to *Abingdon*, there is no precept or command to the sheriff to summon the knights to make an election of other jurors there, or commission to the judges to swear them; 2 Bl. Rep. 1261. *Luke v. Harris*; and it seems the sheriff should return that he had summoned them in the alternative according to the exigence of the writ.[m] After the knights have appeared and chosen of themselves and 20 others, a jury, the next step is the *venire facias*, which, it seems, is to return the jury into bank as in other actions, and the demandant may then sue out a *habeas corpus recognitorum* in the alternative like the writ of summons. If the four knights do not appear on the first writ of summons, the demandant may sue out an *alias* or *pluries* summons; or he may have a *habeas corpora quatuor militum*, in the alternative, as in the writ of summons. 2 Towns. Judg. 115. Booth, 102. It has been doubted whether a writ of right can be tried at the assizes, or any where else but at bar. 2 Black.

[m] It seems settled, that the *nisi prius* clause in the alternative may be inserted in the writ of summons; but if it be omitted, and the knights come up from a distant county to *Westminster*, the court will not compel them to be sworn, unless the demandant will pay their expences. 1 Taunt. 415. *Pearson v. Maynard*. If there be a *nisi*

prius clause, the sheriff may summon the knights at the assizes from among the grand jury. 1 Brod. & Bing. 17. *Windle v. Ricardo*. 3 B. Moore, 249. S. C. The court will not allow the demandant to quash a writ of summons irregularly executed. 1 Marsh. 602. *Adams. v. Radway*.

Rep. 1261. 1298. *Luke v. Harris*. But besides that it is the constant practice to try writs of right at the assizes, it seems to me that it is taken for granted in some of the best authorities, that writs of right may be tried at nisi prius, 12 H. 7. 10. Bro. Droit de recto, 28. S. C. Bro. Nisi Prius. 16. 17. 24. Jenk. Cent. 38.

If there be not four knights in the county the sheriff may return others. When the four knights appear, it is said by Lord Coke that, they cannot be challenged. Co. Litt. 294. a. but are sworn lawfully and truly to choose 20 knights girt with swords who best know and will declare or say the truth between the parties; and the demandant and tenant may be ordered to go with the four knights to make their challenges before them to those that shall be chosen by them; for after the panel made by the four knights, no challenge can be made either to the array or to the polls. 29 Edw. 3. 2. b. 7 H. 4. 20. a. S. C. abridged. Bro. Droit, 6. 1 Leon. 303. *Wigot and Clarke's case*. Lit. a. 514. Bro. Droit, 12. It is said however 15 Edw. 4. 1. by Coke and Littleton justices, against the opinion of Co. Litt. 294. a. that the four knights may likewise be challenged when they and the parties are choosing the other knights, and that if one be challenged it is to be tried by the other three, and if two be challenged by the other two; and if three be challenged a new writ must issue to choose four other knights, for no challenge can be tried by less than two. When the recognitors are called and appear, 16 are sworn: the form of the oath is in Litt. sect. 514. 3 Wils. 541. *Tyssen v. Clarke*.

The tenant first begins his case, because the mise is first prayed for and joined by him. 3 Leon. 162. *Heidon and Igrave's case*. S. C. 1 And. 148. Moore, 762. *Andrews v. Lord Cromwell*. Dyer, 247. b. pl. 75. However if the tenant tenders the demy-mark in court at the time of the trial, the demandant must then begin; so held by Mr. Justice Heath in *Throgmorton, bart. v. Broke*, Gloucestersummer assizes 1800, who cited the said case in Moore, 762. [n]; but it seems questionable whether that case warrants it; these three points were ruled by the court: 1. That the demy-mark ought to be tendered at the joining of the mise, yet the judges now take it at the appearance of the jury. 2. The tenant ought to begin in the giving of evidence. 3. The jury cannot find a special verdict. It is said in Bro. Droit, 48. that nothing can be pleaded in this action but a collateral warranty, and everything else may be given in evidence upon the mise joined. Booth, 98. 112. And the court of C. P. seem to have been of the same opinion in *Tyssen v. Clarke*, 3 Wils. 420. The form of the judgment when there is a verdict for the demandant after the mise joined is in 3 Wils. 563. So if the tenant make default or confess the action after the mise joined, final judgment is given, though not until after a *petit cape* is first sued out and a default thereon, according to 5 Rep. 86. a. *Penryn's case*. Booth, 101.; but in 1 Bulst. 161, 162. *Herne v. Lilborne*, it is held, that final judgment is given without any *petit cape*, against the resolution in *Penryn's case*; and so is Co. Litt. 295. 1 Show. 20. 65. *Sleigh v. Chetham*. F. N. B. 11. 12. 7th edit. But if the verdict be for the tenant,

[n] And accordingly it was held by Mr. Baron Wood, in *Hardman v. Clegg*, Holt's Ni. Pri. Cas. 670., that a tender of the demy-mark before the swearing

of the grand assize, was sufficient to put the demandant to prove the seisin of his ancestor.

or the demandant be nonsuited after the mise joined, the judgment is in this form: "Therefore it is considered that the said *Thomas Dee* and *Ann* his wife take nothing by their said writ, but be in mercy for their false claim thereof, and that the said *Elizabeth Druce*, widow, go thereof without day, &c. and that she the said *Elizabeth Druce* hold the tenements aforesaid with the appurtenances to her and her heirs, quit of the said *Thomas Dee* and *Ann*, his wife, and the heirs of the said *Ann*, for ever." 2d Towns. Judg. 115. And if judgment be for husband and wife tenants, where they have joined the mise in right of the wife, then it is, "that the husband and wife, and the heirs of the wife, shall hold quit of the demandant and his heirs." Fitz. Droit, 8.

If a writ of *quod ei deforceat*, in the nature of a writ of right, be brought in the courts of great sessions in *Wales*, pursuant to the statute of Rutland, (12 Edw. I.) the mise joined upon the mere right is ordained by that statute to be tried by a common jury of 12 men, and therefore the common jury process of a *venire facias* is there used; which may be made returnable the next day after the teste; for in *Wales* the process is from day to day in one and the same sessions. Cro. Car. 179. *Gryffyth v. Jenkin*; vid. ante, 42. Still however it is held, that final judg-

ment shall be given as in writs of right in *England*; for though the manner of the trial is altered by the statute, yet the judgment which belongs to such actions remains as it was before. 5 Rep. 85. b. 86. *Penryn's case*. 2. Although it be said that every thing but a collateral warranty may be given in evidence upon the mise joined upon the mere right, yet the tenant may also plead several other matters specially; as that the tenant levied a fine with proclamations, or that the ancestor of the demandant made his will, and devised away the lands: or that the tenant recovered the same premises from the demandant in a writ of right by the verdict of the grand assize, and had final judgment. And the issues upon these pleas are to be tried by a common jury of 12 men as other issues are. Bro. Droit, 30. 42, 43. Booth, 113. 3 Wils. 420. [o] It is said that the safest way is to join the mise on the mere right and give the special matter in evidence: at the same time however it is observed, that it is frequently the least dilatory and vexatious mode for the tenant, where the matter in bar is clear, to plead it. Booth, 115. At the common law there were no costs in any real action, and as no damages are recovered, neither the demandant nor tenant is intitled to costs in this action by the statute of Gloucester or any other statute. 10 Rep. 116. *Pilfold's case*.

[o] But the court will not permit the mise joined in a writ of right to be tried by a jury instead of the grand assize,

although both parties desire it. 1 Bos. & Pull. 192. *Galton v. Harvey*.

William, the heir of William, *against* Gwyn.

Easter, 20th of King Charles the 2d. Roll. 260.

S. C. 1 Vent.
 60. 2 Keb. 460.
 551. 605. If a
grand cape be
 awarded against
 the tenant upon
 his appearance,
 and default after
 in the same term,
 and on the re-
 turn of the *grand*
cape judgment
 be given for the
 demandant, it is
 not assignable
 for error, be-
 cause it was to
 the tenant's
 advantage.

* [46]

ERROR brought by *William*, as heir to *William* his father, against *Gwyn*, to reverse a judgment in dower in the great sessions of the county of *Brecon*, in *Wales*, where *Gwyn* was demandant in dower (5) against *William* the father, who appeared in chief upon the summons, and the demandant made her demand, and the * tenant said nothing, but suffered judgment for want of an answer, and the court thereupon awarded a *grand cape*, and on the return of it judgment was given for the demandant to recover her dower, and she had execution; after which the tenant died, and the plaintiff, as son and heir (6) of the tenant, brought a writ of error, and assigned the general error.

And *Saunders* for the plaintiff in error, assigned an error at the bar, upon which he insisted, namely, that it appeared by

(5) If the husband at any time during the coverture is seised in fee simple, fee tail general, or as heir in special tail, upon his death his wife is entitled by the common law to dower, provided she is then 9 years old, whether she has issue by him or not. Litt. sect. 36. The reason of specifying the estates above mentioned is, because her issue may in any of those cases inherit as heir; the rule being, that the wife is entitled to be endowed of such tenements only as her issue may inherit as heir to her husband; for if her issue cannot inherit, the wife is not intitled to dower; as where the husband is seised of an estate to him and the heirs of his body by a former wife, his second wife has no right to dower. Litt. s. 53. So the wife of a jointenant in fee is not intitled to dower, because the estate upon his death does not descend to his heir, but survives. Co. Litt. 31. b. The wife is intitled to dower although the husband had only a seisin *in law*; as where he dies before entry, still his wife shall

be endowed; and the reason assigned is, because it is not in the wife's power to reduce her husband's estate into his actual seisin, as he may do his wife's: and therefore it is held that he shall not be tenant by the curtesy unless there has been an actual seisin by him or his wife. Co. Litt. 31. a. But she shall not be endowed, where the seisin of her husband is defeated; as if three acres of land descend from A. to B. and A.'s wife recover dower of one acre *against* B. who afterwards dies, his wife shall be endowed only of the remaining two acres, although A.'s wife dies in her life-time, because the seisin of B. was defeated; but if B. had died and his wife were endowed of the three acres, and A.'s wife recovered *against* her, and died, B.'s wife shall enter again into the one acre. Co. Litt. 31. a. b. It is not necessary that the husband should *die seised*; if he alien the land, it is subject to her dower, for her title is consummate by the marriage and over-reaches the alienation. Co.

the record that the tenant had appeared in chief, and the demandant had counted against him, and he suffered judgment to pass by *nihil dicit*, and yet the court awarded a *grand cape*, whereas a peremptory judgment ought to have been given WILLIAM,
the heir of
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Litt. 32. a. It is however necessary that the marriage do continue: for if the husband and wife are divorced *a vinculo matrimonii*, the dower ceases; but if they are divorced only *a mensa et thoro*, as for adultery, &c. she is still intitled to dower. Co. Litt. 22. a. [p] But a wife is not entitled to be endowed of lands which her husband was seised of for an instant, or as an instrument; as if *cestui que use* after statute 1 R. 3. c. 1. and before statute 27 H. 8. c. 10. had made a feoffment, his wife should not be endowed. Co. Litt. 31. b. So if lands at this day be conveyed to B. and his heirs to the use of C. and his heirs, which is a use executed by the statute 27 H. 8. c. 10. the wife of the feoffee or relessee has not title of dower. It is also settled that there is no dower of a trust estate, or of an equity of redemption *in fee*. There was no dower

of an use before the statute, it being entirely a legal demand, and there is no difference between a trust now and an use before the statute. Cases temp. Talb. 138. *Attorney-general v. Scot.* 3 P. Will. 232—235. *Chaplin v. Chaplin.* 2 Atk. 525. *Godwin v. Winsmore.* 1 Bro. 326. *Dixon v. Saville.* (q) Women were not dowable of tithes till the statute 32 H. 8. c. 7. s. 7.; for before that time tithes were not a lay fee, but now by the express words of the statute a wife is entitled to be endowed of them. Co. Litt. 32. a. 159. a. 11 Rep. 25. b. *Harpur's case.* [r] Nor are they of a copyhold estate unless by custom; but when it exists, it is held that the wife shall have the benefit of the laws which are made for the recovery of dower in cases of freehold, and therefore shall recover damages within the statute of Merton. Co. Litt.

[p] But it appears from the same passage, that if the wife elope and live with the adulterer, she forfeits her dower.

(q) But although a husband could not be tenant by the curtesy of an use before the statute; yet he shall have his curtesy of a trust estate at this day. 1 P. Wms. 108. *Watts v. Ball.* A reason for this distinction is suggested by Lord Redesdale in 2 Sch. & Lef. 388. *D'Arcy v. Blake*, viz. that parties had been acting on the supposition that the creation of trust estates would bar dower; and that it was necessary for the security of purchasers, mortgagees, and other persons taking the legal estates, to depart, in cases of dower, from the general principle of courts of equity, which is in acting upon trusts to follow the law; but it was not necessary in

cases of tenancy by the curtesy, because no such practice had prevailed.

[r] In 1 Taunt. 410. *Stoughton v. Leigh*, the court of C. B. certified, "that a woman is dowable of all her husband's mines of lead and coal, as well those which were in his own landed estates, as the mines and strata of lead and lead ore, and coal, in the lands of other persons, which had, in fact, been open and wrought before his death, and wherein he had an estate of inheritance during the coverture; and that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or by those claiming under him since his death." See some judicious remarks on this case in Park on Dower, 116. et seq.

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On an appearance in chief and default afterwards in the same term no *petit cape* ought to be awarded, but judgment of seisin should be given; and so on a *nilhil dicit* recorded.

A *grand cape* does not lie but on a default of the tenant before appearance in chief, for after such appearance a *petit cape* lies if the tenant makes default in another term.

upon the *nilhil dicit* without any award of a *grand* or *petit cape*. For upon an appearance, and default afterwards in the same term, no *petit cape* ought to be awarded, but judgment of seisin should be given, and so it is on a *nilhil dicit* recorded, as appears by all the books, and the constant practice. 38 Edw. 3. 13 b. 17 H. 4. 19. Coke's Entries, 171. Plow. Comm. 41. Also a *grand cape* does not lie, but when the tenant makes default before his appearance in chief; for after an appearance in chief a *petit cape* lies, if the tenant make default in any other term after his appearance; but if he make default in the same term in which he appears, a peremptory judgment shall be given, namely, for the demandant to recover seisin, as appears by the books above cited, and according to the constant practice; and besides, the words of the *grand cape* are that the tenant shall shew cause "*wherefore he was not in our court at such a day past as he was summoned*:" and so it is in the case at bar, which is absurd and repugnant; because it appears by the body of the record that the tenant *had appeared in chief on the same day* that the

32. a. Moor, 410. pl. 559. *Shaw v. Thompson*, 4 Rep. 22. a. But if she be not intitled to dower by custom, and yet bring a writ of dower, the heir may plead that her husband *ne unques seisie que dower*, and give the special matter in evidence, 2 Bac. Abr. 123. So a wife who is an alien, whether friend or enemy, shall not be endowed. Co. Litt. 31. b. But it is said that if she be married by the king's special licence she is entitled to her dower. 1 Roll. Abr. 675. Hargrave, Co. Litt. 31. b. n. (9).

(6) No person can bring a writ of error unless he is *party* or privy to the record, or is prejudiced by the judgment; the rule upon the subject being, that a writ of error can only be brought by him who would have had the thing, if the erroneous judgment had not been given. 1 Roll. Abr. 747. (K) pl. 1. Dy. 90. a. 2 Bac. Abr. 195. Therefore in a plea of land against the tenant, the heir to the land must in case of the tenant's death bring error; as

if one who has lands on the part of his mother, loses them by an erroneous judgment and dies, his heir on the part of his mother only can bring error. 1 Leon. 261. *Henningham and Windham's case*. S. C. Owen, 68. So the younger son who is entitled by the custom of borough-english must bring error, and not the heir at common law, for the remedy descends with the land. Ibid. So error upon a judgment against tenant in special tail must be brought by the heir to the special tail. F. N. B. 50. 7th edit. 1 Roll. Abr. 747. (K.) pl. 2. So at common law if judgment had been obtained against lessee for life, the reversioner or remainder man, if immediate, might bring error after his death; and now by statute 9 R. 2. c. 3. may during the continuance of the estate for life. 3 Rep. 4. a. *Marquis of Winchester's case*. 5 Mod. 397. *Anon*. So since the *statute de donis*, error may be brought by him who has a remainder or reversion immediately expectant on an estate tail.

grand cape supposes that he was not in our court, and therefore the writ of *grand cape* is contrary to the record; and for this error he prayed that the judgment should be reversed.

Jones for the defendant in error, and all the court agreed, that the great sessions might have given judgment of seisin without awarding any *grand* or *petit cape*; but *Jones* said, that the plaintiff cannot assign it for error, because it is only to the disadvantage and delay of the demandant, and not at all prejudicial or hurtful to the tenant, and therefore

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A man shall not reverse judgment by error, unless he can shew that the error is to his disadvantage.

3 Rep. 4. a. It is not necessary to shew either in the writ of error, or *scire facias*, how the plaintiff in error is heir, unless in some particular cases, as where a special heir in tail or heir in remainder brings error; for there it is held that he must shew specially how he is heir, or has the remainder. Cro. Jac. 160. *Champernow v. Godolphin*. It seems that error upon an attainder for treason or felony may be brought either by the heir or the executor. 1 Leon. 325. *Marsh's case*. 1 Show. 13. *The King v. Ayloff*. S. C. 1 Salk. 295. But if there be judgment against the *principal* and also against the *bail*, the principal cannot have error on the judgment against the bail, nor the bail on the judgment against the principal, nor can they join in a writ of error any more than tenant for life, and he in remainder can join, for they are several judgments and affect distinct persons. 1 Roll. Abr. 748, 749. Cro. Car. 408. *Bushell v. Yalle*. Ibid. 481. *South v. Gryffith*. S. C. Sir W. Jones, 396. Cro. Car. 561. *Anon*. 1 Lev. 137. *Atherton v. Hole*.

(7) So giving oyer where it ought not to be allowed is not assignable by the defendant for error, being to his advantage, though the denial of it, where it ought to be allowed, is error. 2 Ld. Raym. 970. *Longueville v. Inhabitants of Thistleworth*.

(8) Where the error is *by default of the court*, it may be assigned by him

who is benefited by it; as where in debt it is found that the defendant owes the plaintiff 5*l.* and the jury assess damages to 2*d.* and costs 2*d.* and the judgment is, that the plaintiff shall recover his debt, and damages aforesaid to 2*d.* and no judgment is given for the costs, the defendant may assign this omission for error though it be to his advantage. 1 Roll. Abr. 759, pl. 1, 2, 3, 4. 760. pl. 5. S. P. 4 Leon. 61. *Bushey v. Milfield*. Jenk. 211. pl. 48. But if the default be in the *verdict*, to the advantage of the defendant, he cannot assign it for error. 1 Roll. Abr. 760. pl. 6. And now by statute 16 & 17 Car. 2. c. 8. it is enacted, "that no judgment after verdict, confession by *cognovit actionem*, or *relicta verificatione*, shall be reversed for want of *misericordia* or *capiatur*, or by reason that a *capiatur* is entered for a *misericordia*, or a *misericordia* is entered where a *capiatur* ought to have been entered; nor for that *ideo concessum est per curiam* is entered for *ideo consideratum est per curiam*; nor for that the increase of costs, after a verdict in any action, or upon a nonsuit in replevin, are not entered to be at the request of the party for whom the judgment is given; nor by reason that the costs in any judgment whatsoever are not entered to be by consent of the plaintiff; but that all such omissions, variances, defects, and all other matters of like nature, not being against the right of the matter of the suit, nor

WILLIAM,
the heir of
WILLIAM,
v. GWYN.

* Fitz. Error,
92.

† Tey's case,
S. P. 8 Rep.
59 a. Beecher's
case.

‡ [47]

not to be alleged as error for him, inasmuch as it is not to the "great damage of the plaintiff," as the writ of error supposes. And for that he cited the books of 8 H. 4. 2.* b. F. N. B. 21. f. 5 Rep. 39. b. (†) (7). And though it was objected on the other side that it was an error in the judgment itself, and might therefore be well assigned for error, notwithstanding it was to the advantage ‡ of the plaintiff in error; as in 8 Rep. 59. Beecher's case, a *misericordia* entered in a judgment instead of a *capiatur*, is assignable for error, though it be for the benefit of the party against whom the judgment is given, because it is error in the judgment itself. (8) But the whole court, without any difficulty, affirmed the judgment for the reason given by Jones, without taking any notice of this objection.

"whereby the issue or trial are altered" "whereunto the record is or shall be
"shall be amended by the justices, or" "removed by writ of error." See
"other judges of the courts where such" Willes's Rep. 600, 601. *Middleton v.*
"judgments are or shall be given, or" *Wynne*.

Case 5.

Wilbraham against Snow.

Hil. 20 & 21 of King Charles the 2d. Roll. 1540.

S. C. 1 Lev. 282.

1 Sid. 438.

1 Vent. 52.

1 Mod. 30.

2 Keb. 588.

A sheriff may maintain an action of trespass or trover against any person who takes away goods which he has seized in execution. S. P. 6 Mod. 291.

TROVER, upon special verdict, the case was this; the plaintiff, being sheriff, seized goods in execution by virtue of the writ of *feri facias*; and afterwards, and before they were sold, the defendant took and carried them away, and converted them to his own use; for which the plaintiff brought his action. And on the first argument it was adjudged that the action well lies; and that the plaintiff, being sheriff, has such a property in the goods, by seizing them in execution, that he may maintain an action of trespass or trover at his election (1); and judgment was given for the

(1) S. P. 6 Mod. 292. *Clerk v. Withers*; for he is answerable to the plaintiff to the value of the goods taken under the writ of *feri facias*; and the defendant is discharged from the judgment and all further execution, if the sheriff has taken goods to the amount

of the debt, although he does not satisfy the plaintiff; 2 Roll. Rep. 57. *Slie v. Finch*; 6 Mod. 292. 299. *Clerk v. Withers*; S. C. 1 Salk. 323.; or has not returned the writ; and it will be a *scire facias* on the judgment. Cro. Eliz. 237. *Mountney v. Andrews*. S. C.

plaintiff *nisi*, &c. but it was not moved afterwards. *Sympton* WILBRAHAM v. SNOW.
for the plaintiff; *Winnington* for the defendant. See 34 H. 6.
36 a. (2) and the case of *Ayre v. Aden* in Moor, 737. Cro.
Jac. 73. Dalt. Office of Sheriffs, case 2. fol. 19. which case

4 Leon. 150. S. P. 2 Ld. Raym. 1072. *Clerk v. Withers*. [a] But to prevent improper conduct in the sheriff, it will be prudent for the plaintiff, or defendant, (for either may do it,) to rule him to return the writ, if he has not already done so. [b] And now in practice it has become a frequent action; thus (among many others which might be mentioned) the case of *Bamford v. Baron*, cited in 2 Term Rep. 594. *Edwards v. Harben*, note (a), was an action of *trover* by the late sheriff of the county of L., against the defendants, who had seized the goods in question,

which formerly belonged to one H., after they had been taken in execution at the suit of a creditor, to whom the sheriff had paid the value, and no objection taken to the form of the action. In that case it was stated, that the sheriff had paid the value, but that does not appear to be necessary; for if he had not paid the value, it seems from the determination in the principal case, he might have maintained the action, because by the seizure he acquired a special property in the goods, and was responsible to the plaintiff for the value of them. [c]

[a] But one obligor cannot plead that the goods of his co-obligor were seized under a *f. fa.* for it is no actual satisfaction of the debt; the plea is confined to the party whose goods are taken. 2 Show. 394. *Dyke v. Mercer*. See post, 344. note (3).

[b] So the defendant may rule the sheriff to return the writ, although there has been no sale, but the defendant has paid the money. 7 Taunt. 5. *Edmunds v. Watson*. 2 Marsh, 330. S. C. but when a compromise is entered into by the parties neither of them can rule the sheriff. 5. T. R. 470. *Alchin v. Wells*. The court will not compel the sheriff to specify in his return the price at which each particular article has been sold. 6 Taunt. 576. *Willet v. Sparrow*. 2 Marsh, 293. S. C. If the property in the goods be disputed, the court on the application of the sheriff, suggesting a reasonable doubt, will enlarge the time for making the return, till the right be tried between the parties, or one of them indemnify the sheriff;

7 T. R. 174. *Wells v. Pickman*; 1 Taunt. 120. *Thurston v. Thurston*; Tidd. 1034. Chitty's Rep. 294. *Ledbury v. Smith*; Ibid. 643. *Rex v. Sheriff of Devon*; or will stay the proceedings in an action against the sheriff. 4 Taunt. 585. *M^cGeorge v. Birch*. 7 Taunt. 294. *King v. Bridges*. 1 B. Moore, 43. S. C. Chitty's Rep. 577. *Probinia v. Roberts*. It is entirely discretionary with the courts whether they will interfere to protect the sheriff, or not, and on what terms. 7 T. R. 177. per Lord Kenyon C. J.

[c] But the sheriff must continue in possession in order to maintain any action against a person taking them; for where the sheriff's officer seized a table in the name of all the goods in a house, and locked up his warrant in the table drawer, and left the house, it was held that the possession was abandoned by the sheriff, and that no action lay by him against the landlord, who afterwards distrained the goods. 1 M. & S. 711. *Blades v. Arundale*. But a landlord who has distrained goods cannot

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was adjudged as reported in those books, against the report of Yelverton, 44. and the Roll is in *Easter* 44 Eliz. Rol. 318. (3)

In order to maintain *trover* it is necessary that the plaintiff should have either an absolute or a special property in the goods which are the subject of the action. 7 Term Rep. 398. *Webb v. Fox*, per Lawrence J. He who has an absolute or general property may support this action, although he has never had the actual possession; for it is a rule of law, that the *property* of personal chattels draws to it the *possession*, so that the owner may bring either trespass or trover at his election against any stranger who takes them away. Thus if A. in London gives J. S. his goods at York, and another takes them away before J. S. obtains actual possession, J. S. may maintain trover or trespass for them. Bro. Trespass, 303. Latch. 214. *Hudson v. Hudson*. [d] So where a man has wreck by prescription or grant and another takes it away, he may bring trover or trespass before

seizure. F. N. B. 207. D. 7th edit. 2 Wils. 23. *Biddulph v. Arthur*. And upon this principle it was held, on the trial of an ejectment for a mine, that recovery in *trover* for a parcel of lead dug out of the mine, was no evidence of the plaintiff's possession of the mine. Bull. N. P. 33. Also where A. is indebted to C. and B. to A. and it is agreed between them, that B. shall give goods in his possession, which were the goods of A. to C. in satisfaction of A.'s debt; if B. converts them, C. may maintain trover against him, although he never had possession, for by the agreement, the right of property was in him, and the conversion is a wrong to him. Bull. N. P. 35. So where an executor declares upon the *possession* of his testator, and of a conversion by the defendant after his death, it is held to be sufficient, because the property is vested in the executor, and that

maintain trover for them, for he has no property in them, but has them only as a pledge with a power to sell by statute. *Moneux v. Goreham*. Selwyn's Ni. Pri. 1303. Parker, 112. *Rez v. Cotton*.

[d] The attention of the court does not appear to have been directed to this case in 2 B. & A. 551. *Irons v. Smallpiece*, in which it is laid down by Abbot C. J. that "by the law of England, in order to transfer property by gift there must either be a deed (or instrument) of gift, or there must be an actual delivery of the thing to the donee." It is presumed that the word "instrument" means an instrument under seal: the case was one of an action of trover by the donee against the executors of the donor for two

colts verbally given to the plaintiff by the deceased six months before his death, but never delivered to him, and was likened to a *donatio mortis causæ*, in which it is clear that there must be an actual delivery to the donee or some one for him, in order to transfer the property. 7 Taunt. 226. *Bunn v. Markham*. 2 Marsh, 532. S.C. Holt. Ni. Pri. 352. S. C. 2 Bl. Com. 514. It was held that the action would not lie; but it does not follow that the case of *Hudson v. Hudson* is over-ruled, for it may still be held that a donee by a parol gift acquires such a special property as to be able to maintain an action against a mere wrong doer, though the donor may resume the thing given.

draws after it the possession in law. Latch. 214. 7 Term Rep. 13. *Gordon v. Harper*, per *Lawrence* justice. In like manner a man who has delivered goods to a carrier, or other bailee, and so parted with the actual possession, may maintain trover for a conversion by a stranger, for the owner has still possession in law against a wrong-doer, and the carrier, or other bailee, is no more than his servant. 7 Term Rep. 12. *Gordon v. Harper*. But it is said that if the bailee, or other person who has only a special property, sells and delivers the goods to another, as his own *bond fide*, and without notice, the general owner cannot maintain this or any other action against the vendee, because by such a sale by a person who has a special property in, and possession in fact of the goods, the property of the general owner is altered. Bro. Trespass, 216. 295. [e] However there must exist a *right of possession*, as well as of property, to support this

action; therefore, where a man let a house and furniture for a term, and the furniture was wrongfully taken in execution pending the term, it was holden, that the lessor could not maintain trover, because during the term he had parted with the *right of possession*. [f] 7 Term Rep. 9. *Gordon v. Harper*.

Or, 2dly, he must have a special property in the goods; thus a carrier may maintain trover against a stranger who takes the goods out of his possession. 1 Roll. Abr. 4. (I.) pl. 1. 1 Ld. Raym. 276. *Arnold v. Jefferson*. Bull. N. P. 33. So may a factor or other consignee, or pawnee, or trustee; so if a house be blown down and a stranger take away the timber, the lessee for life may bring trover, for he has a special property to make use of it for the purpose of rebuilding, although the general property is in the owner. Bull. N. P. 33. So the lord of a manor may, before the expiration of a year and a day, and even before seizure, bring trover against a

[e] However, in recent cases it has been held that if a bailee of goods for a particular purpose transfers them to another in contravention of that purpose, the general owner may maintain trover against that person, even although he be a *bond fide* vendee, unless in market overt. 2 Campb. 335. *Wilkinson v. King*. 2 Stark. 311. *Loeschman v. Machin*.

[f] But where the person to whom the goods were let was a married woman living separate from her husband, and therefore unable to gain any property in them, it was held that such a bailment did not deprive the real owner of his action of trover. *Smith v. Plomer*. K. B. 52. G. 3. cited in Peake on Evidence, 4th edit. p. 342.; that a right of possession is necessary, see further, 3 Campb. 417. *Benjamin v. Bank of England*; but where A. had

sold goods to B., and B. had paid for them, and afterwards, before delivery to B., C. became possessed of the goods, and on being informed of the circumstances declared that he would not deliver them to any person whatsoever; it was held that A. having repaid B. might maintain trover against C. without any further proof of conversion; for the contract between A. and B. was rescinded, and A. remitted to his former right; 5 M. & S. 105. *Pattison v. Robinson*; and although where goods are let for a term of years, the lessor cannot maintain trover for them during the term, yet if trees or other things fixed and annexed to the freehold and demised therewith be severed during the term, they immediately become vested in the owner of the inheritance and he may maintain trover for them. 5 B. & A. 826. *Farrant v. Thompson*.

stranger who takes away an estray from off his manor. *Ibid.* So if a man lends his cattle to J. S. to plough his land, and a stranger takes them away, J. S. may maintain trover or trespass against him. Bro. Trespass, 92. The agister of cattle may also maintain trover against a stranger who takes them away. Bro. Trespass, 67. [g] So churchwardens may bring trover for the goods of the church taken away either in their own time, or in that of their predecessors, for the churchwardens of the preceding year cannot maintain an action after the expiration of their year. 11 H. 4. 12. a. Com. Dig. Eglise (F. 3.) F. N. B. 208. K. 7th edit. Bro. Garden d'esglise, 4. 6. 7. 2 P. Will. 126. *Attorney-General v. Ruper.* 2 Str. 852. *Dent v. Prudence.* If the action be brought for a conversion in their own time, the declaration, it is said, may conclude either *ad damnum ipsorum*, or *parochianorum*, at their election; but if the successors bring the action for a conversion in the time of their predecessors, the declaration must of necessity conclude *ad damnum parochianorum*. Cro. Eliz. 145. 179. *Hadman v. Ringwood*; but a bailee must conclude "to his own damage," for he recovers to his own use, and is chargeable over to the bailor. Bro. Garden d'esglise, 7.

So possession with an assertion of title, or even possession alone, gives the possessor such a property as will enable him to maintain this action against a wrong-doer; for possession is *prima facie* evidence of property. 1 Salk. 290. *Blackham's case*. As in trover for certain loads of wood, the case was, that Sir T. P. having a large wood, sold to one C. and his assigns, as

many trees as would make 600 cords of wood to be taken by the assignment of Sir T. C. assigns over his interest to the plaintiff; afterwards Sir T. granted to the defendant so much of his wood as would make 4000 cords to be taken at the defendant's election: afterwards the plaintiff by the assignment of Sir T. cut down the trees in question to make 600 cords, and the defendant claiming them by virtue of his grant took them; and it was found that there was sufficient wood left for the defendant; it was held that the action was maintainable, because by cutting down the trees, *the plaintiff had possession, and a good title*, against the defendant and every stranger; and being cut down, the defendant could not lawfully take them; and even supposing the plaintiff had not a good title, yet *having possession of the trees was sufficient*. Cro. Eliz. 819. *Basset v. Maynard*. S. C. 5 Rep. 24 b. Moor, 691, 692. So in trover for a quantity of rushes, it was proved that the plaintiff, being possessed of a cottage at T. and an inhabitant there, and as such claiming a right to cut rushes upon T. common for his own use, cut down about 5 or 6 load of rushes, which the defendant carried away; the judge, being of opinion that the evidence was insufficient, nonsuited the plaintiff; but a rule having been obtained why there should not be a new trial, it was insisted for the plaintiff that this was such evidence of property in the plaintiff and of a conversion by the defendants, who appeared to be mere strangers, as made it necessary for them, if they had any defence, to have gone into it at the trial, so that the whole might have been left to the jury; and although the plain-

[g] A person who has a temporary property in goods delivering them to the general owner for a special purpose, may, after that purpose is an-

swered, upon a demand and refusal maintain trover for them. 2 Taunt. 268. *Roberts v. Wyatt.*

tiff had not a lawful right to cut rushes, still as he claimed such right, and asserted it by cutting them, and thereby gaining possession, he acquired a property sufficient to put the defendants upon shewing they had a better property in them; to which the court agreed, and said it was sufficient evidence against the defendants, who had neither by evidence or pleading shewn any right or title whatever to the rushes, and must therefore be taken to be mere strangers and wrong-doers; that indeed a person who has no colour of right to cut down rushes, or take any other thing, cannot by cutting the rushes or taking the thing without any colour of right acquire a property: but in the case at bar the plaintiff proved he had a right to cut the rushes, and did cut them, and therefore he gained a property in them. 3 Wils. 332. *Rackham v. Jesup*. So where, in trespass for taking and dispersing a load of fern ashes, the defendant pleaded that he was an occupier of land in A. the tenants whereof had a right of common, and of cutting fern in a particular place in which the plaintiff wrongfully cut fern, and burnt it, whereupon the defendant scattered it about as he well might; upon demurrer to the plea, the court held that if the plaintiff did him any damage he might have brought his action, but after the plaintiff had burnt the fern, and thereby acquired possession of it, a commoner had no right to come and disperse it. 2 Str. 777. *Woodson v. Newton*. It is true this was an action of

trespass, but it seems unquestionable that trover would also have lain, and so was the opinion of the court of common pleas in the above cited case of *Rackham v. Jesup*. [h]

There may also be a special property arising simply out of a lawful possession, but which ceases when the true owner appears; as where the plaintiff, being a chimney sweeper's boy, found a jewel and carried it to the shop of the defendant, who was a goldsmith, to know what it was, and delivered it into the hands of his apprentice, who, under pretence of weighing it, took out the stones, and called to the master to let him know it came to three halfpence, the master offered the boy the money, but he refused to take it, and insisted on having the thing again; whereupon the apprentice delivered him back the socket without the stones; and in trover against the master it was ruled, 1. That though the finder of a jewel does not acquire an absolute property, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover. 2. That the action well lay against the master who gave a credit to his apprentice and is answerable for his neglect. 1 Str. 505. *Armory v. Delamirie*, in *Middlesex*, coram Pratt C. J. In like manner a person who has only a special property may in some cases maintain trover, although he has never had actual possession. 1 Bos. & Pull. 44. *Fowler v. Down*. Thus, a factor to whom goods have been consigned, but which he has never received, may

[h] So where the plaintiff bought a vessel which was stranded, but she was not conveyed to him according to the provisions of the register acts; the plaintiff took possession of her, and for some days endeavoured to save her, but afterwards she went to pieces, and parts

of the wreck drifted upon the defendant's premises, and were by him cut up and carted away, it was held that there was enough property in the plaintiff to enable him to maintain trover. 2 Taunt. 302. *Sutton v. Buck*.

bring this action. However without such absolute or special property this action cannot, as we have already noticed, be maintained; therefore tenant in tail, expectant on the determination of an estate for life *without impeachment of waste*, cannot bring trover for timber which grew upon, and was severed from, the estate; for such a tenant for life has a right to the trees the moment they are cut down. 1 Term Rep. 55. *Pyne v. Dor.* And the plaintiff must not only prove that the goods, which are the subject of the action, are his property, but also *that they were so when they were converted* by the defendant. As where goods stolen were purchased in market-overt, and sold by the purchaser before the felon was convicted, it was decided that the owner of the goods prosecuting to conviction could not maintain trover against the purchaser under the statute 21 H. 8. c. 11. which gives a restitution to the owner who prosecutes the felon to conviction, [i] although he gave the purchaser notice of the robbery while they were in his possession: for the property, being altered by the sale in market-overt, was not re-vested in the owner until the conviction of the felon, but the defendant had parted with the possession before that time, and therefore could not be said to have converted the plaintiff's goods. 2 Term Rep. 750. *Horwood v. Smith.* And the action may in most

cases be brought either by the general or special owner of the goods for a conversion thereof by a stranger, and judgment obtained by one is a good bar to the action of the other. Bro. Trespass, 67. 2 Roll. Abr. 569. (P.)

Another ingredient of this action is that there should be a *conversion* by the defendant; as to which, it is a common learning, that where the goods came into the defendant's possession by delivery or finding, the plaintiff must demand them, and the defendant refuse to deliver them up, in order to constitute a conversion. 1 Sid. 264. *Bruen v. Roe.* Bull. N. P. 44. But such demand and refusal is only *evidence* of a conversion [j], and therefore if it be found in a special verdict that the plaintiff demanded the goods of the defendant and *he refused*, the court cannot adjudge it a conversion. 10 Rep. 56. b. 57. a. *Chancellor of Oxford's case.* 2 Mod. 244. *Mires v. Solebay.* Bull. N. P. 44. But a demand and refusal is no evidence of a conversion, where it is apparent that the defendant has made no conversion; as where the defendant cut down trees and left them lying in the place where they were felled; for he cannot be said to have converted the trees if they continue there as before. 2 Mod. 244. *Mires v. Solebay.* Bull. N. P. 44. So a demand and refusal is no evidence of a conversion in the case of a carrier or whar-

[i] This statute is confined to cases of felony; therefore where goods are obtained from a person by false pretences and passed to another for a valuable consideration, the original owner is not entitled to them upon conviction of the offender; and if he has got possession of them, trover will lie at the suit of the purchaser. 5 T. R. 175. *Parker v. Patrick.*

[j] Which conversion may or may

not have been cotemporaneous with the demand and refusal; for where an attorney had been possessed of certain deeds of the plaintiff for a considerable time prior to *Michaelmas* term, and a demand and refusal on the 29th of *November* was proved, the court held it evidence of a conversion prior to *Michaelmas* term. 5 B. & A. 847. *Wilton v. Girdlestone.* 1 Dow. & Ry. 488. S. C.

finger, where the goods are proved to have been lost through negligence, or stolen; and therefore trover does not lie, though the owner may have an action upon the case. 1 Vent. 223. *Owen v. Lewyn*. 2 Salk. 655. *Anon.* 5 Burr. 2825. *Ross v. Johnson*. Bull. N. P. 44, 45. [k] Nor where it appears that the carrier or wharfinger detained because the plaintiff refused to pay for the carriage or wharfage of them; 2 Ld. Raym. 752. *Skinner v. Upshaw*; *Ibid.* 866. *Yorke v. Grenaugh*; and therefore if the person, in whose possession the goods are, has a lien upon them for a debt due to him from the owner, the plaintiff must prove that he paid or tendered the money before the bringing of the action, for otherwise the defendant will have a right to retain

the goods. See 3 Bulst. 269. *Robinson v. Walter*. 1 Salk. 388. *York v. Grindstone*. 2 Show. 161. *Anon.* 2 Roll. Abr. 92. (M.) pl. 3. 6. Cro. Car. 271. *Chapman v. Allen*. Bull. N. B. 45. [l] But if the carrier or wharfinger break open a box containing goods, or sell them, or had them in his custody at the time of the refusal, a demand and refusal is evidence of a conversion, and trover may be maintained. 2 Salk. 655. *Anon.* [m]

It has been held too, that not only claiming property as *one's own*, but asserting the right of *another* over it, is, upon demand and refusal, evidence of a conversion; as where it was found, that a bankrupt, being indebted to G. delivered goods to G.'s servant, who gave a receipt for them in his master's

[k] But trover will lie against a carrier who delivers goods to a wrong person, though by mistake. Peake's Ni. Pri. Cas. 68. *Youl v. Harbottle*; or against a warehouseman under the same circumstances; 2 B. & A. 702. *Devereux v. Barclay*; or where he delivers them upon a forged order; 1 Stark. 104. *Lubbock v. Inglis*; however for a bare non-delivery it will not lie, per Lord Ellenborough C. J. in 4. Esp. 157. *Severin v. Keppell*; unless the goods be in the possession of the defendant and he refuse to deliver them on demand. 1 Taunt. 391. *Dewell v. Moxon*. A carrier's assertion that he has delivered goods to the consignee which is false, is no evidence of a conversion. 1 Campb. 409. *Attersoll v. Briant*.

[l] But if he refuse to deliver the goods on a different ground without mentioning his lien, he cannot afterwards set it up as a defence to the action. 1 Campb. 410. n. *Boardman v. Sill*.

[m] If A. finds the goods of B. and upon a demand of the goods answers

that he knows not whether B. be the true owner, and therefore refuses to deliver them; this is not evidence of a conversion, if A. keep them for the true owner. 2 Bulst. 312. *Isaac v. Clarke*; per Coke C. J. 3 Campb. 215. n. *Green v. Dunn*. S. P. per Lord Ellenborough C. J. 1 Esp. 83. *Solomon v. Dawes*. per Lord Kenyon, C. J. So where a party at the time of refusal has it not in his power to deliver up the goods, the refusal is no evidence of a conversion, as where he had deposited a lease with his attorney, who he said had a lien on it; 1 Campb. 439. *Smith v. Young*; and the refusal must be positive and absolute, and not merely evasive. 4 Esp. 157. *Severin v. Keppell*. So where a servant of a company refused to deliver the plaintiff's goods, which were in one of their warehouses, of which he kept the key, without an order from the company, this refusal was held not to be sufficiently absolute to constitute a conversion. 5 B. & A. 247. *Alexander v. Southey*.

name, and sold them for his master's use; the court determined that the sale, whether for the use of the seller or another was a conversion; for where a person takes upon himself to dispose of another's property, it is a tortious act and the gist of the action. 1 Wils. 328. *Perkins v. Smith*. S. P. 2 Str. 813. *Parker v. Godin*. [x] So where a carpenter, who worked in the king's yard, refused to go there any more, upon which the surveyor would not let him have his tools until the king's work was done under a pretended usage to do so; a demand and refusal being proved, it was held by Holt C. J. that the denial of goods to him who has a right to demand them is an *actual conversion*, and not evidence of it only; for what is a conversion but an assuming upon one's self the property in, and right of disposing of, another's goods? and whoever detains another man's goods without cause takes upon himself the right of disposing of them. 6 Mod. 212. *Baldwin v. Cole*. [o] So where a man, entrusted with the goods of another, puts them into the hands of a third person without orders, it is a conversion: as where the owner of goods on board

a vessel directed the captain not to land them on a wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use under an idea that the wharfinger had a lien on them for the wharfage fees, because the vessel was unloaded against the wharf; it was held, that the owner upon demand and refusal might maintain trover against the captain, unless he could establish the wharfinger's right; for putting the goods into the custody of the wharfinger brings a charge upon the plaintiff, and is therefore a conversion by the defendant. 4 Term Rep. 260. *Syeds v. Hay*. [p] If a man make use of a thing, found, or delivered to him, it is a conversion. Cro. Eliz. 219. *Mulgrave v. Ogden*. So if he misuse it, Cro. Eliz. 219., as if a carrier draw out part of a vessel and fill it with water, it is a conversion of all the liquor. 1 Str. 576. *Richardson v. Atkinson*. The taking and carrying away of another's goods is a conversion, and therefore it is not necessary in such case to prove a demand and refusal. 1 Sid. 264. *Bruen v. Roe*. 6 Mod. 212. *Baldwin v. Cole*. Bull. N. P. 44. [q]

[x] And accordingly in 4 M. & S. 259. *Stephens v. Elwall*, it was held that a servant may be charged in trover, though the conversion be done by him for the benefit of his master.

[o] The same point was ruled in 6 East, 538. *McCombie v. Davis*, where the defendant had taken tobacco as a pledge from the broker of the owner: but it should be observed, that in both these cases there was a demand and refusal. See also 2 T. R. 376. *Hoare v. Parker*.

[p] See ante, 47 b. note (c)

[q] Therefore a bankrupt without a demand and refusal may bring trover against his assignees in order to try the validity of the commission; for the

goods, although taken by legal process, are taken from him by compulsion. 3 Brod. & Bing. 2. *Summersett v. Jarvis*. But the assignees cannot bring trover without a demand and refusal for goods collusively sold by a bankrupt on the eve of his bankruptcy; for the parties contracting were competent at the time, and if the assignees disaffirm the contract they should give notice by a demand. 2 H. Bl. 135. *Nixon v. Jenkin*; and see further 5 East, 407. *Bloxam v. Hubbard*. 4 Taunt. 799. *Lovill v. Martin*.

A conversion which has once taken place cannot be cured: therefore if A. take B.'s horse and ride him and afterwards deliver him to B., yet trover will lie and the re-delivery will go only in

The next consideration is by what persons this action may be maintained; it is settled that one jointenant, tenant in common or parcener, cannot maintain trover against his companion for a thing still in his possession, because the possession of one is the possession of both, and the defendant may take advantage of it on the general issue. Co. Litt. 200. a. 1 Salk. 290. *Brown v. Hedges*. Bull. N. P. 34. Thus where the plaintiff and defendant C. were members of a friendly society, which levied a fund by weekly contribution from each other, and the aggregate sum was kept in a box deposited with the plaintiff, who gave a bond for the safe custody of it, C. took away the box and delivered it to the other defendant W. who was not a member of the society; the learned judge who tried the cause nonsuited the plaintiff, and the court of K. B. on an application for a new trial confirmed the nonsuit, and said, that as all the members of the society had a joint property in the box and its contents, they were therefore tenants in common, and it was an undoubted rule that one tenant in common cannot maintain trover against another. And moreover, as it was admitted that one of the defendants was a member of the society, he had a general property in the box, and therefore a special property such as the plaintiff had, the custody only having been

committed to him, and the general property still remaining in the society, could not give a right in this action against a general property. 1 Term Rep. 658. *Holliday v. Cammell*. [r] But if one jointenant, tenant in common or parcener, destroy the thing in common, the other may bring trover. Co. Litt. 200. a. Therefore where one tenant in common of a ship took it away and sent it to the *West Indies* where it was lost in a storm, this was held by King C. J. of the C. B. to be evidence of a destruction, and the jury under his directions found it to be so. Bull. N. P. 34, 35. [s] For in all cases where one tenant in common misuses that which he has in common with another, he is answerable to the other in an action as for misfeasance. 8 Term Rep. 146. *Martyn v. Knowllys*. If one jointenant, tenant in common or parcener, bring trover against a stranger, he must plead the jointenancy, &c. in abatement; and if he neglect to do so, he cannot give it in evidence on the general issue; but the plaintiff is entitled to recover only the value of his share. 2 Lev. 113. *Nelthorpe v. Dorrington*. 1 Salk. 290. *Brown v. Hedges*. Bull. N. P. 35. See also 1 Saund. 291 g, h, and the authorities there cited. Where the goods of a feme sole come into the possession of another by finding, delivery or otherwise, and he converts them after her marriage, either the husband alone may

mitigation of damages. 1 Rol. Abr. 5. (L) pl. 1. *Countess of Rutland's case*. 3 Campb. 396. *Wyatt v. Blades*.

[r] Acc. 1 East, 363. *Smith v. Stokes*. Ibid. 368. *Smith v. Oriell*. See also Selwyn's Ni. Pri. 1313.; and for the general principle, see 5 B. & A. 395. *Barton v. Williams*, and 4 Taunt. 29. *Jackson v. Anderson*.

[s] See this case more fully reported by the name of *Barnardiston v. Chapman*, in 4 East, 121. *Heath v. Hubbard*: from which last case it seems

pretty clear, that the mere sale of a ship by one tenant in common is not equivalent to a destruction; partly, as it should appear, because the sale passes only the interest of the seller. But *quære* as to the sale of any other chattel in market overt? Where one tenant in common of a whale refused to deliver a moiety of it to the other, and cut it up and expressed the oil, this is no destruction so as to subject him to an action of trover. 1 Taunt. 241. *Fennings v. Lord Grenville*.

bring the action, inasmuch as the conversion which is the cause of the action, was after the marriage; or the husband and wife may join, for the inception of the cause of action by the finding or delivery was before the marriage; and therefore it is held, that the declaration may state that the wife, while she was sole, lost the goods, and that plaintiffs intermarried, and the defendant after their intermarriage converted them. 2 Lev. 107, 108. *Blackborn v. Greaves*. Bull. N. P. 34. But husband and wife cannot have an action of trover and declare that they were both possessed of certain goods, and that the defendant converted them to their damage, for the possession of the wife is the possession of the husband, and so is the property; therefore the conversion cannot be to the damage of the wife, but of the husband. Yelv 165, 166. *Draper v. Fulkes*. 1 Salk. 114. *Nelthrop v. Anderson*. If an apprentice earn any thing, trover lies by the master; as where a waterman's widow took an apprentice who went to sea and earned two tickets which came into the defendant's possession, the widow brought trover for the tickets and had judgment; for what an apprentice gains is for the use and benefit of his master, and it is not material whether he be legally an apprentice or not, for it is sufficient if he be so in fact. 1 Salk. 68. *Barber v. Dennis*. S. C. 6 Mod. 69. [t] So if a servant purchase goods for his master, which are afterwards converted by another, it is held that the master may maintain trover; for by the possession of the servant the property is vested in the master; although indeed the judgment was reversed on another point. Cro. Eliz. 638, 661. 746. *Holiday v. Hicks*.

If a vendee of goods orders them to be sent by a particular carrier, a delivery to him, or his servant, vests the property in the vendee, who may bring

trover against a stranger that detains, or takes them away; or if they are damaged or lost, the vendee must stand to the loss, and the action against the carrier can only be brought in his name. Where a tradesman ordered goods to be sent him, and in his letter added, "Pray be expeditious in sending them, and instead of letting them go by the way of *Bristol*, where many things you have sent me have been detained, send them by *land carriage*;" the goods were delivered to the book-keeper of the *Birmingham* carrier to be sent from thence by way of *Coventry* to the vendee who lived at *Carmarthen*; and it appeared there was no other mode of conveyance by *land carriage*. The goods being lost, the vendor brought an action against the vendee for the price, insisting that the delivery to the carrier was a delivery to the defendant, but the learned judge who tried the cause, being of a different opinion, nonsuited the plaintiff; however the court of K. B. held that, as there was no other mode of sending the goods by *land carriage*, it amounted to the same thing as if the defendant had ordered the goods to be sent by the *Birmingham* carrier particularly by name; and therefore the delivery being made according to the order of the defendant was a delivery to, and vested the property in, the defendant, and the nonsuit was set aside. Cowp. 294. *Vale v. Bayle*. So where a tradesman in the country gave an order for goods from *London*, and directed them to be sent by a particular carrier, to whom they were accordingly delivered by the vendor, who had them booked, and paid for it: the goods being lost, the vendor brought an action against the carrier, but was nonsuited, and the nonsuit confirmed by the court, who held that, by the delivery to a particular carrier according to the vendee's direction, the property vested in him,

[t] See Co. Litt. 117. a. note.

and of course he must stand to the risk; that the money for booking was paid by the vendor as agent of the vendee, and therefore the action could not be maintained by the vendor, but ought to have been brought by the vendee. 8 Term Rep. 330. *Dawes v. Peck*.

It was said by counsel in argument, and assented to by Lord Chancellor King, that if a tradesman in London send goods by order to a tradesman in the country by a carrier not appointed by the country trader, if the carrier embezzles the goods, the trader in the country must stand to the loss. 3 P. Will. 185, 186. *Godfrey v. Furzo*. And this seems to be confirmed by Lord Hardwicke in 1 Atk. 248. *Snee v. Prescott*, who says, that if goods are delivered to a carrier or hoyman to be delivered

to A. and the goods are lost, A. can only bring the action, which shews the property be in him. [u] But if the vendor agrees with the carrier to pay him for the carriage, the vendor may bring an action against the carrier, because the vendor stands in the character of an insurer to the vendee for the safe arrival of the goods, and it is no part of the question to inquire in whom the property vests. 5 Burr. 2680. *Davis v. James*. S. P. 1 Term Rep. 659. *Moore v. Wilson* [v]: and Lord Mansfield in *Vale v. Bayle*, observes, that if the vendor takes upon himself actually to deliver the goods to the vendee, he stands to all risks; but if the vendee order a particular mode of conveyance, the vendor is excused. Cowp. 296. [w]

Let us next inquire against whom

[u] And it is now settled that although no particular mode of conveyance be ordered by the vendee, yet a delivery to a carrier for his use vests the property in him. 3 Bos. & Pull. 582. *Dutton v. Solomonson*. 5 M. & S. 189. *Groning v. Mendham*. But the vendor must, in delivering them to the carrier, do all that is necessary to entitle the vendee to recover against the carrier in case of loss. 3 Campb. 414. *Buckman v. Levi*: Therefore where the carrier gave notice that he would not be liable above 5*l*. unless the goods were insured, it was held that the vendor not having insured, could not recover the price of the goods against the vendee on the ground of delivery to the carrier. 14 East, 475. *Clarke v. Hutchins*. But see 3 Campb. 129. *Cothay v. Tute*, where Lord Ellenborough appears to have changed his opinion, and to have thought that the vendor would not be justified in insuring without special orders from the vendee.

[v] It has however been held by Mr. Justice Laurence, in 2 Campb. 639.

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King v. Meredith, that the vendor, by agreeing to pay the carriage, does not stand to the risk. But where a bill of lading stated goods to have been shipped by the plaintiffs to the order of A., at Surinam, and the freight to have been paid by the plaintiffs in London, Lord Ellenborough C. J. held that an action for non-delivery would lie on the bill of lading at the suit of the plaintiffs. 3 Campb. 320. *Joseph v. Knox*; otherwise, if the bill of lading merely expresses the goods to have been shipped by order and on account of the vendee. 2 Campb. 36. *Brown v. Hodgson*.

[w] "The action of trover cannot be supported unless there is a perfect and complete right of property in the plaintiff: hence where goods are sold, if any thing remain to be done on the part of the seller, as between him and the buyer, to ascertain the price, quantity, or individuality of the goods, before the commodity purchased is to be delivered, a complete present right of property does not attach in the buyer, and consequently trover is not maintainable,"

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this action may be brought. If a woman has been guilty of a conversion *before* her marriage, or a wife, without her husband, converts goods during the coverture, this action lies against husband and wife; in the former case the declaration must state the conversion to be to *her own use*: unless the subject matter is in existence, and the husband refuses to deliver it up on demand, in which case the course of precedents seems to warrant the laying of the conversion to *their own use*. 2 Rich. Pract. C. P. 5th edit. 162, 163. [x]; and in the latter case conversion must be alleged to be to the use of *the husband only*; however, if the conversion be the *joint act* of husband and wife, it seems the action may be brought against the husband alone, for the conversion is held in law to be the act of the husband only. Cro. Car. 254. *Rhemes v. Humphreys*. Ibid. 494. *Perry v. Diggs*.

1 Roll. Abr. 6. pl. 7. 348 (u) pl. 1. Co. Litt. 351. b. Palm. 344. *Berry v. Nevey*. Com. Dig. Baron and Feme (Y). And it has also been adjudged that the action may be brought *against husband and wife*, if it be laid in the declaration that they converted *to the use of the husband*; as where in trover the declaration stated that the goods came into the possession of husband and wife, and *they* converted them to the use of the husband, &c. it was objected, that the conversion was laid to the charge of the wife as well as of the husband, to which it was answered and resolved, that the point of the action is the conversion, which is a wrong that a married woman may be charged with, as well as with a trespass or disseisin. Yelv. 165, 166. *Draperv. Fulkes*. S. P. 1 Roll. Abr. 6. pl. 6., but if it be alleged in the declaration that the husband and wife converted *to their own use*, it is agreed, that it is a fatal

Selwyn's Ni. Pri. 1300. citing 12 East, 614. *Whitehouse v. Frost*. 13 East, 522. *Wallace v. Breeds*. 2 M. & S. 397. *Bush v. Davis*. 5 Taunt. 176. *White v. Wilks*. 1 Marsh. 2. S. C. 5 Taunt. 617. *Shepley v. Davis*., 1 Marsh. 252. S. C. 4 Camp. 237. *Withers v. Lys*. 1 Holt. 18. S. C. 6 East, 614. *Hanson v. Meyer*. 2 Campb. 240. *Zagury v. Farnell*. 11 East, 210. *Rugg v. Minett*. See also 4 Taunt. 644. *Austen v. Craven*. 1 Taunt. 318. *Mucklow v. Mangles*.

Where goods are sold upon certain conditions to be performed at the time of delivery, and the goods are delivered, but the conditions not performed, trover will lie to recover them back. *Bishop v. Skillito*, cited in 2 B. & A. 329. *Hornblower v. Proud*.

[x] It should appear that the facts stated would not support an allegation that the *husband and wife converted to their own use*, nor an allegation that the wife converted to the use of the husband and wife; for the wife's conversion

before marriage, and the husband's conversion evidenced by his demand and refusal are manifestly separate and distinct conversions; for the latter the action should have been brought against the husband *alone*, and the former could not have been to *their use*, because it was before marriage. It is plain that several defendants cannot be found guilty in trover without evidence of a *joint conversion*: therefore where bankrupts and their assignees were joined as defendants in an action of trover, and a verdict passed against all the defendants upon evidence that the bankrupts before their bankruptcy had converted the goods of the plaintiff by pledging them without authority, and that the assignees after the bankruptcy had refused to deliver them up on demand, the court held that the conversions were separate, and granted a new trial for want of evidence of a joint conversion. 1 M. & S. 588. *Nicoll v. Glennie and others*.

error even after verdict, for a wife cannot in law convert to her own use. 1 Roll. Abr. 6. pl. 6. Ibid. 348. (U.); Sir W. Jones, 16. *Berry v. Nevys*; S. C. Bro. Jac. 661.; Sir W. Jones, 264. *Bullen's case*; Cro. Car. 254. *Rhemes v. Humphrys*; Ibid. 494. *Perry v. Diggs*; Andr. 245. *Smalley v. Kerfoot*; though the contrary was decided in Sir W. Jones, 443. *Hodges v. Sampson*; but it is said that if the jury in such case find the wife not guilty, the declaration is aided by it. Marsh. pl. 134. (y) But if trespass be brought against husband and wife, and the declaration state a conversion by them to their own use, it does not vitiate the declaration. As where trespass was brought against husband and wife for breaking and entering the plaintiff's house and taking his goods, and converting them to their own use; after verdict for the plaintiff it was held that the conversion is not the gist of trespass, as it is of trover, trespass being maintainable for entering the house and taking the goods, and therefore the court would not presume that any damages were given for the conversion, it being surplusage and laid as matter of aggravation, and consequently the declaration good. Andr. 242. *Smalley v. Kerfoot*. S. C. 2 Str. 1094. So the action may be brought against any person who was a party to the conversion, although the goods were actually converted by another; as where an execution is delivered by

A. to the sheriff against the goods of B. who at the time has committed an act of bankruptcy, and A. gives a bond to indemnify the sheriff, and he seizes the goods and sells them and pays the money to A. and afterwards a commission of bankruptcy is taken out against B., the assignees may bring trover against A. because by giving the bond he has made the conversion his own act. Bull. N. P. 41. And the law seems to be the same, though A. should not give a bond of indemnity, if he receives the money: 2 Str. 996. *Rush v. Baker*, which is the same case with that cited in Bull. Ni. Pri. 41. And if the sheriff seizes and sells the goods without notice of an act of bankruptcy, and before any commission issued, and pays the money over to the plaintiff, the sheriff is excused. 1 Black. Rep. 205. *Timbrell v. Mills*, 2 Burr. 818. 820. *Coppendale v. Bridgen*. And the plaintiff will be obliged to refund, and be liable to an action of trover or *indebitatus assumpsit* at the election of the assignees. 2 Black. Rep. 827. *Hitchen v. Campbell*. 3 Wils. 304. S. C. But in the latter action they can only recover the money which he has actually received. [z]

Regularly the declaration should state that the plaintiff was possessed of the goods, as *of his own proper goods*, and that they came to the hands of the defendant *by finding*; but it has been held that the omission of these words is not material after verdict. Moor, 691.

[y] However, it has been since determined in 3 B. & A. 685. *Keyworth v. Hill*, that a declaration against husband and wife, charging that they converted to their own use is good after verdict: for the verdict does not proceed upon an acquisition of property in the defendants, but upon a deprivation of property in the plaintiff, and the conversion may have been by destruction.

[z] Trover will lie against a corporation. 16 East, 6. *Yarborough v. Bank of England*. And it does not seem necessary that the conversion should be authorized by an instrument under seal; but, if it be, such authority will be presumed after verdict. Ibid. ante, vol. i. p. 340. note [a].

Maynard v. Basset. Hard. 111. *Jones v. Winckworth.* Latch. 214. *Hudson v. Hudson.* And if the plaintiff has never had *actual possession* of the goods, he need not allege that he was possessed: as where goods of a testator are taken and converted after his death, and before the executor obtains possession of them, he may declare that the *testator* was possessed of the goods and chattels, and the defendant after his death converted them, without saying that the *executor* was possessed. Latch. 214. *Hudson v. Hudson.* See the form of the declaration, Rob. Ent. 80. 447. 2 Instr. Cler. 5th edit. 448. But inasmuch as the conversion, which is the gist of the action, was after the death of the testator, the plaintiff will be liable to costs, if he fails in the action. Or, as the property of the goods draws to it a possession in-law, the executor may also declare upon his own possession as executor. 6 Mod. 182. *Jenkins v. Plombe.* Still however if he fails in the action he will be liable to costs. Latch. 214. *Hudson v. Hudson.* Ibid. 220. *Worfield v. Worfield.* 1 Vent. 109. *Anon.* Cro. Car. 219. *Atkey v. Heard.* *Paul v. Delander*, cited in Andr. 357. Cas. Temp. Hardw. 204. *Harris v. Hanna.* Com.

Rep. 162. *Hole v. King.* 7 Term Rep. 358. *Bollard v. Spencer.* 2 Bos. & Pull. 256. *Tattersall v. Groot.* In these cases it is not necessary for the plaintiff to name himself executor. 1 Salk. 314. *Eaves v. Mocato.* Com. Rep. 162. But where the trover and conversion have been in the testator's life time, there, it seems, the executor is not liable to pay costs. 4 Term Rep. 277. *Cockerill v. Kynaston.* S.C. cited by *Le Blanc J.* in *Ord v. Fenwick.* 3 East, 110. And if the goods were taken in the testator's life-time, and kept to the time of his death, although not used until after, the executor may declare of a trover and conversion in the testator's life-time. 1 Str. 60. *Crossier v. Ogleby.*

If trover be brought upon the possession of an intestate, the defendant, it is said, cannot give in evidence upon not guilty, a will and an executor, for it must be pleaded; but if it be brought upon the possession of the *administrator*, the defendant may take advantage of it in evidence. So if an executor bring trover upon his testator's possession, he is not bound upon the general issue to prove himself executor, but it is otherwise, if he declares upon his own possession. [a] 7 Mod. 141.

[a] That is, if he declares without naming himself executor upon his own *constructive possession*: for if he were *actually* possessed of the property before it came to the hands of the defendant, he need not show his title in order to establish a *prima facie* case. The reason why he need not prove himself executor where he declares on his testator's possession is, because he necessarily describes himself as executor, and makes profert of the letters testamentary, which are admitted by the general issue. See ante, vol. i. p. 276. n. [c]. 2 M. & S. 553. *Thynne v. Protheroe.* 3 Taunt. 113. *Hunt v. Stevens.* So the assignees

of a bankrupt, who have never had actual possession, may declare either on the possession of the bankrupt, or on their own constructive possession. And in general, it is advisable to insert in the declaration counts in each form; for where the assignees of two partners, bankrupts, declared on the possession of the bankrupts only, and it appeared in evidence that the greater part of the goods in question belonged to one of the partners only before the commencement of the partnership, and had never been brought into the partnership fund, and that the residue formed part of the joint estate, Lord Kenyon C. J. held

Blainfield v. March, per Holt C. J. S. C. 2 Ld. Raym. 824. 1 Salk. 285. Holt, 44.

Whenever *trespass* for taking goods

will lie; that is, where they are taken wrongfully, *trover* will also lie; for one may *qualify* but not *increase* a tort. Cro. Eliz, 824. *Bishop v. Montague*. S. C.

that the plaintiffs could recover the residue only; whereas, if there had been a count on the possession of the assigness, as it was a joint commission, and the assignment under such commission passes both joint and separate effects, the whole might have been recovered; *Cock v. Tunno*, MS. cited in Selwyn's Ni. Pri. 1316.; and there would not have been any misjoinder, since the plaintiffs would have described themselves as assignees of both partners in the count on their own possession, which they might well do, although the property was separate, the commission being joint. However, assignees under a joint commission, when suing for a separate demand, are not obliged to describe themselves as assignees of all the bankrupts; it is sufficient if they describe themselves as assignees of those bankrupts for whose separate demands they sue. 15 East, 428. *Scott v. Franklin*. 3 Campb. 399. *Stonehouse v. De Silva*. 2 Stark. 17. *Harvey v. Morgan*. But where the commissions are separate, and the same persons appointed assignees under each, although they may declare for a joint demand, due to all or any number of the bankrupts, describing themselves as assignees of those bankrupts; 15 East, 428. *Scott v. Franklin*; 3 T. R. 779. *Streetfield v. Halliday*; yet they cannot declare in the same declaration for separate demands due to each bankrupt, nor for joint demands, and also separate demands. 3 T. R. 433. *Hancock v. Haywood*. Nor, as it should seem, could they if the commission were joint, notwithstanding what is thrown out in 3 Bos. & Pull. 469. *Smith v. Goddard*; for the assignees are in no better situ-

ation than the bankrupts would have been if solvent, and the bankrupts must, undoubtedly, have brought separate actions. The suggestion of Lord Kenyon C. J. as to a second count in the above case of *Cock v. Tunno*, is not repugnant to this principle, because that count would have been grounded on the property which passed by the assignment to the assignees of both the bankrupts: whereas the other cases in this note are grounded on contracts made by the bankrupts, and therefore it necessarily appears by the declaration, that the causes of action are separate: and it is apprehended, that even in *trover* by assignees, a count on the possession of one bankrupt, and another on the possession of the other bankrupt, would be a misjoinder. That the assignees are in the same situation as to joint or separate property that the bankrupts would have been, is clear from the case of *Jerois v. Tayleur*, 3 B. & A. 557., where it was held that the assignees under a joint commission against A. tenant for life, and B. tenant in tail, took by the bargain and sale of the commissioners only an estate for the life of A., with a base fee in remainder; that is, only such estates as A. and B. could separately have conveyed by fine; for the separate creditors of A. had a right to the value of his life estate, and the separate creditors of B. to the value of his estate tail in remainder. Where there are separate commissions against several partners, and different assignees under each commission, in declaring for a joint debt the assignees must not describe themselves as joint assignees, but as assignees of each bankrupt respectively. 2 B. Moore, 3.

Cro. Jac. 50. Sir T. Raym. 472. *Put v. Rawsterne*. 1 Burr. 31. *Cooper v. Chitty* [b]. And if the whole rights and merits of the case have been discussed and determined in one action, the judgment in it may be pleaded in bar to the other. Cro. Car. 35. *Lacon v. Barnard*. Cro. Eliz. 668. *Ferrers v. Arden*. 2 Vent. 169, *Lechmere v. Toplady*. But the converse of the proposition does not hold, for trover may often be brought where trespass cannot; as where goods are lent, or delivered to another to keep, and he refuses to return them on demand, trespass does not lie, but the proper remedy is trover, Sir T. Raym. 472. 2 Vent. 70. So where the taking is lawful, or at least excuseable, trespass cannot be supported, but the owner must bring trover. Thus where one G. on the 5th December 1753 obtained judgment against J. and on the same day took out execution, and J.'s goods were seized under it; on the 4th J. committed an act of bank-

ruptcy, and on the 8th a commission was taken out against him and an assignment executed, and afterwards on the 28th the sheriff sold the goods; it was held, that the seizing of the goods before the commission and assignment was excuseable, and the sheriff was not a trespasser by relation; but the sale after the commission and assignment was a conversion, and subjected the sheriff to an action of trover at the suit of the assignees of J. 1 Bur. 20. *Cooper v. Chitty*. And the same point has been recognized and confirmed in a subsequent case, where it was held that trespass would not lie, but the assignees should have brought an action of trover, 1 Term. Rep. 475. *Smith v. Milles*. If the plaintiff should by mistake bring trespass instead of trover, and judgment be given against him for that reason, it seems the defendant cannot plead it in bar to an action of trover brought afterwards against him. Cro. Eliz. 668. *Ferrers v. Arden*. Cro. Car.

Ray v. Davis. And assignees under a joint commission against A. and B., who have committed acts of bankruptcy at different times, cannot recover money received by the defendant during the interval of the acts of bankruptcy, either as money had and received to the use of the bankrupts, or to the use of the assignees. 2 B. Moore, 122. *Hogg v. Bridges*. In this case the action was for money levied under an execution against A. and B., and therefore it was necessary to establish an act of bankruptcy committed by B. prior to the levy, in order to ground the action as far as B.'s share was concerned; but if the action had been for a debt accruing due to the partnership in the interval between the acts of bankruptcy, no doubt the joint assignees might have recovered, declaring on a promise made to them, as assignees of A., and also to B. before his bank-

ruptcy. And although it was said in this case that A.'s separate moiety could not be recovered by the assignees under this joint commission, yet it is apprehended that this arose from the form of the action, which describes the plaintiffs as assignees of A. and B.; for undoubtedly the assignees of A. and B. under a joint commission may recover in an action *ex contractu* a demand due to A. only, but then they must describe themselves as assignees of A. only. See the cases above in this note.

[b] S. P. 6 T. R. 298. *Shipwick v. Blanchard*, in which it was held that trover would lie for goods taken under a *wrongful* distress, but it will not lie for goods *irregularly* sold under a distress, the statute 11 Geo. 2. c. 19. s. 19. having declared that no person should be considered as a trespasser *ab initio* for any thing irregularly done under a distress. 1 H. Bl. 13. *Wallace v. King*.

35. *Lacon v. Barnard*. 2 Vent. 169, 170. *Lechinere v. Toplady*. Sir T. Raym. 472. *Put v. Rawsterne*. Gilb. Law of Evid. 266, 267.

(2) That case was this: The sheriff of C. returned to a writ of *feri facias* that he had taken goods to the value, for which he had not found buyers; whereupon a *venditioni exponas* issued returnable on the morrow of the *Ascension*, at which day the sheriff returned that the goods were taken by his predecessor, therefore he could not expose the goods to sale; wherefore a *distringas nuper vicecomitem* was awarded that the late sheriff should expose the goods to sale, and deliver the monies arising therefrom to the new sheriff, that he might have them before the justices here on the octave of the *Holy Trinity* to render to the plaintiff for his debt and damages aforesaid. S. C. Fitz. Process, 99. Bro. Retorne de briefe, 15. Execution 11. Process, 15. Hence it appears, that the sheriff after he is out of office is compellable to sell the goods which he seized under the execution; for the same sheriff who begins an execution must end it; and the *distringas nuper vicecomitem* does not give him an authority to sell, but obliges him to do that which he has a power to do. 1 Roll. Abr. 893. (B). pl. 2. 1 Salk. 323. *Clerk v. Withers*. 6 Mod. 299. 2 Ld. Raym. 1074, 1075. S. C. The student will perhaps better understand the nature of the writ of *distringas nuper vicecomitem*, by seeing the form of it: "George the third, to the sheriff of S. greeting: We command you, that you distrain E. F. late sheriff of your county by all his lands and chattels in your bailiwick, so that neither he, nor any one by him, do lay hands on the same, until you have another command from us in that behalf, and that you answer us for the issues of the same; so that he expose

" to sale those goods and chattels which
" were of C. D. in your bailiwick, to
" the value of l. which lately
" in our court before us (before our justices at Westminster if in C. B.) were
" adjudged to A. B. for his damages
" which he had sustained, as well on
" occasion of not performing certain
" promises and undertakings then lately
" made by the said C. D. to the said
" A. B. as for his costs and charges by
" him about his suit in that behalf expended, whereof the said C. D. is
" convicted, as appears to us of record;
" and which goods and chattels he
" lately took by virtue of our writ, and
" which remain in his hands unsold for
" want of buyers as the said late sheriff
" returned to us (to our said justices,
" C. B.) at Westminster at the return
" day of the writ aforesaid, and have
" that money before us (before our
" justices) at Westminster, on
" next after (on the morrow of
" All Souls) to render to the said A. B.
" for his damages aforesaid, and have
" there then this writ. Witness, &c."
See Rast. 164. a. where the recovery was in debt in the C. B. and Thesau. Brev. 90. from which the above precedent is taken. The first step is to call upon the old sheriff to return the writ; which by the statute 20 Geo. 2. c. 37. he must be required to do within six months after the expiration of his office, and which months are construed to be lunar months, and the day on which he goes out of office is reckoned as one. Dougl. 463. *The King v. Adderley*. And if he has seized to the value, but not sold, (which is the supposition,) he will return that fact, and also that the goods remain unsold for want of buyers; it being a good return, because the law gives the sheriff a convenient time to sell; but he charges himself by it to the value returned by him. Next issues the writ of *distringas*, but the sheriff

cannot make the same return to it as to the *feri facias*, for he must not always keep the goods in his hands for want of buyers, therefore he is bound to sell, and pay the money under the penalty of forfeiting issues to the amount of the debt. 6 Mod. 295. *Clerk v. Withers*. [c]

If the sheriff makes the same return, and continues in office, the plaintiff may sue out a writ of *venditioni exponas* to compel the sheriff to sell; though he may sell without, for the writ does not give him an authority to do so, but is only to quicken him to do his duty. 6 Mod. 298. *Clerk v. Withers*. The form of the writ will best explain the nature of it: "George, &c. to the sheriff of S. greeting: Whereas by our writ, we lately commanded you that of the goods and chattels, &c. (here recite the *feri facias* to the end) and you at that day returned to us (our justices in C. B.) at Westminster aforesaid, that by virtue of the said writ to you directed, you had taken goods and chattels of the said D. to the value of the damages (or debt and damages) aforesaid, which said goods and chattels remain in your hands unsold for want of buyers; therefore we, being desirous that the said A. B. should be satisfied his

"damages (or debt and damages) aforesaid, command you that you sell or cause to be sold the goods and chattels of the said C. D. by you in form aforesaid taken, and every part thereof, for the best price that can be got for the same, and at least for the damages (or debt and damages) aforesaid, and have the money arising from such sale before us (our justices, C. B.) at Westminster on next after (on the morrow of All Souls C. B.) to render to the said A. B. for his damages (or debt and damages) aforesaid, and have there then this writ. Witness, &c."

If the goods are not taken to the value of the whole debt, the plaintiff may have a *venditioni exponas* for part, and a *feri facias* for the residue in the same writ. See the form in *Theas. Brev.* 305. If the sheriff does not pay the money at the return of the writ, the plaintiff may sue out a *distringas* against him directed to the coroners, and in case he do not sell between the teste and return of the *distringas*, he will forfeit issues to the amount of the debt. 6 Mod. 300. *Clerk v. Withers*.

(3) See also 1 Roll. Abr. 893. (B.) pl. 2.; but Lord Hale in *Mildmay v. Smith*, post. 345. says, the number of the roll was 618.

[c] But the court of C. B. refused to grant an attachment against the sheriff for returning to a *venditioni exponas* that part of the goods seized remained in his hands for want of purchasers. 1 Bos. & Pull. 359. *Leander v. Davis*. And if the plaintiff consent to the sheriff's abstaining from selling the goods, even if it be at the request of the sheriff, and the sheriff go out of office, he cannot afterwards have a *distringas* against him. 3 B. & A. 204. *Ruston v.*

Hatfield. 1 Chitty's Rep. 613. S. C. Where the plaintiff lies by and omits to sue out a *venditioni exponas*, and the sheriff, after returning to the *fi. fa.* that he has seized goods which remain in his hands for want of buyers, delivers them over to the assignees of the defendant who has become bankrupt, and goes out of office, the plaintiff cannot have a *distringas*, but is left to his remedy by action. 15 East, 78. *Clutterbuck v. Jones*.

Fowell *versus* Forrest.

Case 6.

Easter, 21 Car. II. Regis. Rol. 430.

DEBT on bond, dated the 8th of *April* in the 16th year of the reign of the present king; the defendant, after oyer of the condition, pleads, that after the making of the bond, to wit, on the same day and year, the plaintiff by his deed of defeasance (1), here in court shewn, promised and engaged that if he should not produce witnesses, before the last day of *June* then next coming, to prove that the money mentioned in the condition was a true debt, and that the de-

In debt on bond, the defendant pleads a defeasance made after; the plea held ill; it should have been made at the same time— But this does not seem to be law.

(1) A defeasance is an instrument which defeats the force or operation of some other deed or estate; and that which in the *same deed* is called a condition, in *another deed* is a defeasance. Com. Dig. Defeasance. (A.) As where a man by deed grants that, upon payment of a less sum on a particular day, an obligation, recognizance, statute, &c. shall be void. Cro. Eliz. 623. *Hodges v. Smith*. Every defeasance must contain proper words, as that the *thing shall be void*. 2 Salk. 575. *Lacy v. Kynaston*. Willes's Rep. 108. *Trevett v. Aggas*; but a letter of licence that the *obligor shall not be sued* amounts to a defeasance. Carth. 64. *Ayloffe v. Scrimshire*. And the defeasance must be by matter as high as the instrument to be defeated; therefore where, in debt on bond conditioned for payment of 20*l.* on a certain day, the defendant pleaded, that before the day the plaintiff, on account of a trespass committed by his cattle on the defendant's lands, gave him a further day of payment, the plea was held bad on demurrer, because an agreement by *parol* cannot dispense with a

deed. Cro. Eliz. 697. *Hayford v. Andrews*. S. C. Moor, 573. [a] So where, to debt on bond conditioned for payment of money on a certain day, the defendant pleaded that the plaintiff *per scriptum suum sub manu sud signat'* agreed to give time to a future day, the plea was held insufficient on a general demurrer, for the words *scriptum sub manu sud signat'* do not imply a deed. 3. Lev. 234. *Blemerhasset v. Pierson*. See 1 Saund. 291. *Cabell v. Vaughan*, note (1). So where, in covenant for non-payment of money, the defendant pleaded a discharge in nature of a release *without deed*, the plea on demurrer was adjudged to be ill. 2 Wils. 376. *Rogers v. Payne*. Also where a lease contained a proviso that the lessee should not let without leave *in writing* on pain of forfeiture, a *parol* licence was held not to discharge the lessee from the proviso. 2 Term Rep. 425. *Roe v. Harrison*. S. P. Cowp. 47. *Mease v. Mease*. 3 Term Rep. 590. 592. *Littler v. Holland*, and *Brown v. Goodman*, there cited, note (b). [b]

A release to one of several obligors,

[a] S. P. 1 B. Moore, 358. *Thomson v. Brown*. 5 B. & A. 167. *Davey v. Prendergrass*. 8 Price 467. *Bulteel v. Jarrold*.

[b] See ante, vol. i. 287 c. notes [s] [u] & [x].

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fendant before the making of the bond promised to pay it, then the bond should be void, &c. and avers, that the plaintiff did not produce any witnesses to make such proof as aforesaid; to which the plaintiff demurred, and judgment was given for

whether they are bound *jointly*, or *jointly and severally*, discharges the others, and may be pleaded in bar by all. 2 Roll. Abr. 412. (G.) pl. 4, 5. 2 Salk. 574. *Clayton v. Kynaston*. So where the obligee covenants not to sue the obligor at all, he may plead it as a release to avoid a circuitry of action. Cro. Eliz. 623. *Hodges v. Smith*. 1 Term Rep. 446. *Smith v. Mapleback*, per Buller J. 8 Term. Rep. 486. *Burgh v. Preston*. If the obligee covenants not to sue the obligor for a certain time, it does not amount to a defeasance, nor can it be pleaded as such, but is a covenant only, for a breach of which the obligor may bring his action. Carth. 63. *Ayliffe v. Scrimshire*. 1 Show. 46. Comber. 123, 124. 2 Salk. 573. S. C. But where a bond was conditioned that the obligor should indemnify the obligee from all sums he should pay on the obligor's account, and before the bond was executed, a memorandum was indorsed on it, which was part of the condition, that the obligee undertook not to sue upon the bond until after the obligor's death, it was held that the bond was not payable by the obligor himself, but only by his representatives after his death; for the memorandum being part of the condition, differs it from the preceding case,

where the agreement was a collateral one in a different deed. 8 Term Rep. 483. *Burgh v. Preston*. So where two are bound jointly and severally, and the obligee covenants with one of the obligors only not to sue him, it does not amount to a release, but is a covenant only, and the obligee may still sue the other obligor. 2 Salk. 575. *Lacy v. Kynaston*. 12 Mod. 551. 2 Lord Raym. 959. S. C. And the same point was determined in 8 Term Rep. 168. *Dean v. Newhall*, in which the court held, upon the authority of *Lacy v. Kynaston*, that where an obligee covenanted not to sue one of two joint and several obligors, and if he did the deed of covenant might be pleaded in bar, he might still sue the other obligor. [c]

A condition or defeasance, being in favour of the obligor, conusor, &c. must be strictly performed; therefore if there be a condition or defeasance to make the obligation, recognizance, &c. void, on payment of a certain sum on a particular day, the obligor or conusor must pay or tender the money on or before the day; but the plea of payment must in form state it to have been made on the day. Cro. Eliz. 142. *Bond v. Richardson*. Cro. Jac. 434. *Holmes v. Brocket*. 3 T. R. 601. *Sturdy v. Arnaud*. Willes, 586. *Dyke v. Sweeting* [d]; but where

[c] S. P. 6 Taunt. 289. *Hutton v. Eyre*. 1 Marsh. 608. S. C.

The general words of a release, as of any other deed. may be restrained by a particular recital or other part of the same instrument. 4 M. & S. 423. *Payler v. Homersham*. 2 Brod. & Bing. 38. *Solley v. Forbes*.

[d] The reason is, that if the plea state a payment before the day and issue be taken thereon and found for the plaintiff, yet he cannot have judgment; for the issue is immaterial, since notwithstanding this verdict payment might have been made on the day; but if the issue had been found for the defendant,

the plaintiff by *Twysden* justice, *Rainsford* and *Morton* justices being silent, and *Kelynge* chief justice absent, on this point only, that the defeasance being pleaded to be made *after* the FOWELL v.
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it is to be void on payment of the money *on or before* such a day, the plea may state payment *before* the day, and the plaintiff may reply that it was not paid at the particular day mentioned in the plea, *nor at any time before or after that day* [e], which will bring the point to the proper issue, whether the money has ever been paid at all or not; but he must by no means demur; the distinction being, that where the money is payable by the condition at a particular day, the defendant must plead payment at the day, but where it is *at or before* the day, it is otherwise. 2 Bur. 944. *Fletcher v. Hennington*. Willes's Rep. 587. n. (a.) And it will be a good bar without an acquittance under seal. Co. Litt. 212. b. Cro. Eliz. 823. *Earl of Huntingdon v. Hall*. 2 Salk. 508. *Mærie v. Make*. And in pleading a tender according to a defeasance in *another deed*, it is not necessary either to plead that the defendant *has always been and still is ready to pay*, or bringing the money into court; but it is sufficient to plead that *on the day he tendered*; but if the defeasance be in the *same deed* it is otherwise. Willes's Rep. 107. *Trevett v. Aggas*. Formerly payment *after* the day could not be pleaded without an acquittance

by deed. 5 Rep. 43. *Nichol's case*. S. C. Cro. Eliz. 455. Moor, 692. Gilb. H. C. P. 140. 3d edit. However by statute 4 Ann. c. 16. s. 12. it is enacted, that "in debt on a single bill, or debt "or *scire facias* on a judgment, if the "defendant has paid the money, the "payment may be pleaded in bar "of the action or suit; and in debt "upon bond, which has a condition or "defeasance to make void the same "upon payment of a less sum at a certain day or place, if the obligor, his "heirs, executors or administrators "have, before this action brought, paid "to the obligee, his executors or administrators the principal and interest "due by the defeasance or condition, "though such payment was not made "strictly according to the condition or "defeasance, yet it may nevertheless be "pleaded in bar of the action, and shall "be as effectual a bar thereof, as if the "money had been paid *at* the day and "place according to the condition or "defeasance, and had been so pleaded;" so that it is now become a common plea that the defendant paid the money *after* the day, and before the action, according to the statute. [f]

it would probably be cured by the verdict. Whether the condition of the bond be for payment *on* a particular day, or *on or before* that day, if the plea state a payment *on* the day, the replication may simply deny it; for evidence of payment *before* the day will support the issue on the part of the defendant; 3 T. R. 601. *Sturdy v. Arnaud*, per Buller J.; and therefore if the issue be found for the plaintiff the verdict in

fact negatives a payment *on or before* the day.

[e] Or perhaps more correctly, "nor at any time on or before the said day of " (the day mentioned in the condition of the bond.)

[f] But he cannot plead that he *tendered* the money *after* the day. 1 Esp. 110. *Dixon v. Parkes*. 10 Mod. 26. *Player v. Bandy*.

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A bond, judgment or statute may be defeated by a defeasance at a subsequent day. Cro. Eliz. 623. * *Huish v. Philips*.

In a feoffment the condition must be in the same deed, or in another executed at the same time.

bond, could not avoid it; but in order to avoid it, the defeasance ought to have been made *at the same time*, or *at the same instant* with the bond; and not having been made at that time, but after, it was not sufficient to be pleaded in bar of the bond; and judgment was pronounced by *Twysden*, with a *nisi*, &c.; but *Saunders* of counsel with the defendant prayed another day, whereupon *in furore* he gave judgment absolutely, without giving any further day. And I think without much consideration, for the law is clear, that a bond, judgment, or statute, may be defeated by a defeasance made after, as is the common and usual practice. Co. Lit. 207. a. 236. b. 237. a. Cro. Eliz. 755. (*); for a defeasance is only a conditional release, and a release is an absolute defeasance. and the difference is between a thing *vested*, and a thing *executory*; as in the feoffment of lands, the condition must be contained in the *same* charter of feoffment, or in another deed sealed at the *same* time with the charter of feoffment, otherwise the condition is void; because in a feoffment the estate in the land is vested and executed in the feoffee; but a bond or judgment is only executory, and may be released or defeated at any time by a deed sealed, although it be not sealed at the same time with the bond or judgment. And this is clear law without any doubt or ambiguity, although the court on a sudden erroneously mistook it, and gave judgment as before (2).

(2) An obligation, &c. may be defeated by a defeasance made *after* the condition is broken, as well as before. Carth. 64. *Ayloffe v. Scrimshire*.

Case 7. Trethewy *against* Ackland; and Green *against* the Same.

S. C. 1 Mod. 38.
3 Keb. 591.
S. P. 1 Lev.
281. *Jefferies v. Dee*. If an executor plead several judgments, the plaintiff may in his replication answer one only, or every

* [49]

ASSUMPSIT; the plaintiff declares *against* the defendant as administratrix of *Henry Ashwood*, upon an *indebitatus assumpsit*, by the intestate, to the plaintiff in 418*l.* for cloaths made and delivered to the intestate in his life time by the plaintiff, who is a taylor; the defendant pleads in bar, that one *William Clifton* heretofore recovered a judgment in the court of king's bench for 120*l.* debt, and 46*s.* costs of suit, *against* the defendant as administratrix of the intestate (*), and further pleads another judgment obtained in the same

court by one *Nicholas Wood*, against the same defendant, as administratrix, &c. for 190*l.* debt, and 51*s.* costs of suit; (both which judgments appear to be on simple contract and not on specialty,) and the defendant further avers, that the several debts at the time of the death of the intestate, and also at the time of the giving of the said several judgments, were just and true debts, and that the several judgments are yet in full force and not satisfied; she further says, that she has no assets beyond those judgments, &c. and prays judgment of the action, &c. The plaintiff replies, that he ought not to be barred, because as to the judgment of *Clifton*, the plaintiff says, "that the said judgment was had and obtained by fraud and covin between the said *William Clifton* and the said *Margaret Ackland* (the defendant) then first had, to defraud him (the plaintiff) and the other creditors of the said *Henry Ashwood* of their true and just debts; without this that the said sum of 120*l.* (being the debt recovered by *Clifton*) was due to the said *William Clifton* at the time the said judgment was obtained, in manner and form as the said *Margaret* (the defendant) has above thereof in pleading alleged: and this he is ready to verify; wherefore he prays judgment, and his said damages to be adjudged to him." And as to the judgment of *Wood*, the plaintiff replies the same matter (*mutatis mutandis*) as before; whereupon the defendant demurs in law specially, and shews for cause, "that the plea above in replying pleaded is double, and contains two matters, any one of which by itself was alone sufficient to maintain the said action, and also that the several traverses aforesaid ought to be omitted out of the said plea, &c." And it was moved for the defendant, that the plaintiff's replication was clearly double, because when the plaintiff by his replication, admitting it to be good, had avoided *Clifton's* judgment, he will have a general judgment, against the defendant *de bonis intestatoris* without more, and so it is if he avoids *Wood's* judgment; if then the plaintiff will recover by the avoidance of any one of the judgments, he ought not to perplex the court with two matters to enveigle the judgment of the court. For suppose two issues should be joined upon the two several traverses in the plaintiff's replication, and one should be found for the plaintiff, and the other for the defendant, for whom shall judgment be given, for the plaintiff or for the defendant? But if issue be joined upon one only, there will be no such inconvenience; and if the

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judgment plead-
ed. And if he
replies, that the
judgment was
by fraud, he
may rely upon
the fraud gene-
rally, or traverse
the special
matter.

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LAND; and
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* [50]

defendant's plea be bad or false in part, it shall be wholly set aside (1), and the plaintiff shall have his judgment generally as aforesaid; and therefore it was concluded that the replication was double, and the defendant having demurred specially thereto, judgment ought to be given for him. *Sed non allocatur*; for the court overruled it without any regard to the objection, as they had done oftentimes before; however, with great submission, it is an anomalous case, and against the rules of law which condemn double pleading; but it has been allowed in this particular case several times, and so is *Turner's case*, 8 Rep. 132, 133., and *Meriel Tre-sham's case*, 9 Rep. 108. (2). In the next place it was moved for the defendant, that the traverses in the replication ought to be omitted, and that the plaintiff should have relied only upon the fraud pleaded by him in his inducement, and issue ought to be joined upon it, and not whether the money was due at the time of the judgments. For if issue should be joined on the last averment, it might be mischievous to the defendant: for perhaps a small sum may have been paid by the intestate in his life time, of which the defendant had not any notice; in which case the whole issue would be found against the defendant, although there was no fraud or covin in him, and notwithstanding there was but one penny only deficient in the whole sum contained in the judgments, which would be inconvenient and mischievous to the defendant. But on the other hand there will be no mischief or inconvenience to the plaintiff, if issue be joined on the fraud; for if it appear in evidence that the defendant has confessed those judgments where no money was due, or that the judgments were for a greater sum than was due, of which the defendant was conscious, it is full evidence of fraud and covin, and the verdict ought to be found accordingly, and so the true merits of the cause would be tried on both sides. And as a proof that the issue ought to be found upon the fraud generally, and not upon the special matter, *Beaumont's case*, in Latch's Rep. 111. was cited, where it is so adjudged. *Sed non allocatur*; for by the court the plaintiff may traverse the special matter or rely on the fraud generally at his election, and either way is good (3): and judgment

(1) See 1 Saund. 28. *Earl of Manchester v. Vale*, and note (3.)

Raym. 263. *Ashton v. Sherman*. S. C. 1 Salk. 298.

(2) See 1 Saund. 337. *Hancocke v. Prowd*; and 337 b. note (2.) 1 Ld.

(3) This resolution is cited and recognized in Com. Dig. Pleader (2 D. 9)..

without any hesitation was given for the plaintiff, that the replication was good. Note, in *Easter* the 18th of the present king, between *Norton* and Lady *Harvey*, executrix of Sir *Job Harvey* (*), it was adjudged in this court, that where the defendant, in bar to an action of debt upon bond, had pleaded several judgments for large sums obtained against the testator, and among the rest had pleaded a judgment recovered against the testator and one *Erasmus Harvey*, but did not aver that *Erasmus* died before the testator, so that it did not appear that the defendant was liable to that judgment (+), and therefore the plea was insufficient in that part; and although she averred that she had assets only to a small sum, yet for this defect the plea was adjudged insufficient, and bad in the whole, and judgment given against the defendant *de bonis testatoris* generally, and all the judgments, which were well pleaded, set aside; and the judgment was afterwards affirmed in the exchequer chamber (4); the roll whereof is in K. B. Trin. 17 Charles 2. Rol. 134.

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v. ACK-
LAND; and
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* S. C. Sir
T. Raym. 153.
An executrix
pleads several
judgments for
large sums, and
for want of an
averment it does
not appear that
she was liable to
one of them,
the whole plea
adjudged bad,
though she
averred that she
had assets only
to a small sum:
[+ 51]

It seems however doubtful whether the traverse is good; for in addition to the objection above taken by the reporter, it may further be observed, that it is not necessary for an executor who pleads an outstanding judgment to aver that the debt, for which the judgment has been had, was a true and just debt; see 1 Saund. 330. *Hancocke v. Prowd*, note (4.) and the authorities there cited; if it be not so, the plaintiff may reply that the judgment was obtained or kept on foot by fraud, 1 Str. 410. *Williams v. Fowler*; which the defendant is bound to traverse in his rejoinder. Sir W. Jones, 92. *Veale v. Gatesdon*. 1 Ld. Raym. 678. *Parker v. Atfield*; and see 1 Saund. 334. *Hancocke v. Prowd*, note (9.) So that the plaintiff may on this issue give in evidence either that the debt is not a just one, or that less is due than the sum for which the judgment has been given. It is true that in *Green v. Wilcocks*, Cro. Eliz. (462.) it was held that the plaintiff could not, to a judgment pleaded by an executor, reply that it was obtained by fraud and covin,

and rely upon it, but must also traverse that the judgment was for a just debt. That case is in some measure over-ruled by the present, the court here saying that the plaintiff may either rely on the fraud, or traverse the debt at his election. But in 1 Lutw. 662. *Robinson v. Corbett*, it was said by *Powell J.* and which has been adopted ever since, that the plaintiff cannot insist upon any thing but the fraud, and that the opinion in *Green v. Wilcocks* had been a long time exploded, and there was no need to plead that the judgment was for a true debt.

The traverse seems to be an immaterial one on another ground, which is, that it is added after a confession and avoidance. It has already been shewn that a traverse of a matter which has already been sufficiently confessed and avoided, is impertinent and superfluous. 1 Saund. 22. *Bennet v. Filkins*, note (2). 209. *Salmon v. Smith*, note (8). Here the judgment is confessed and avoided by the allegation that it was obtained by fraud, it being held that

the plaintiff may avoid a judgment had against an executor without good cause and by covin, by replying that it was so obtained, and relying upon it ; but if it be had for a true debt, though by covin to defeat the plaintiff, he cannot avoid the judgment. Sir W. Jones, 91, 92. *Veale v. Gatesdon*, 1 and 2 resolution. For it has been adjudged, that the defendant the executor may confess a judgment to a creditor in equal degree with the plaintiff, pending the action, and plead it in bar ; and though it be done for the express purpose of depriving the plaintiff of the debt it is good both in law and equity. 1 P. Will. 295. *Waring v. Danvers*. S. P. Cas. Temp. Talb. 225. *Morice v. Bank of England*. [a] Besides which, I have not been able to meet with any entry either in print or manuscript, where such a traverse as the present has been added ; therefore it seems to be informal and bad upon a special demurrer.

(4) See 1 Saund. 337. note (1) ; but if the fact were, that the testator survived *Erasmus Harvey*, the court would now in all probability permit the defendant to amend the plea.

But although the judgment survives as to the personalty, yet it does not as to the real estate : for at common law the plaintiff might take the goods of the survivor in execution by a *feri facias* ; but the plaintiff under the statute of Westminster 2d must sue out an

elegit against the lands of the survivor, and also of the heir and tertenants of the deceased ; and must sue out a *scire facias* against the survivor, and the heir and tertenants of the deceased. For it seems that where the lands of several are charged with a debt, it shall not lie wholly upon the survivor ; as if a recognizance be acknowledged by several, the lands of them all are thereby become chargeable, and execution must be equally made, and if one dies, the creditor must bring a *scire facias* against his heir and tertenants, and also against the survivors ; but it is otherwise where the lands are not bound ; as if two enter into a bond, and one dies before judgment, the survivor shall be charged alone. 4 Mod. 315. *Lampton v. Collingwood*. So where judgment in debt was had against two, one died, the plaintiff brought *scire facias* against the survivor only ; the defendant pleaded that the other had left lands and an heir upon whom they had descended, and demanded judgment if he should be compelled to answer without the heir being warned ; to which the plaintiff demurred, and judgment was given that the defendant should answer ; for the judgment is against the person ; and although now by the statute of Westminster the second, which gives the *scire facias*, and *elegit*, he may charge the lands and make the judgment real, yet it is at his election to proceed against the personalty if he will. But if he will

[a] See ante, vol. i. p. 333 a. note [e]. So where a debtor on the very day on which a judgment creditor was entitled to execution, confessed a judgment to the plaintiff, another creditor, for a just debt, and the plaintiff sued out execution first ; it was held that the plaintiff was entitled to the preference, for although the judgment was of covin with the defendant, yet it was for a

just debt and not for the defendant's benefit. 5 T. R. 235. *Holbird v. Anderson*. The same point was ruled in the case of an assignment to a trustee for the benefit of all his creditors made by a debtor on purpose to defeat the impending execution of a judgment creditor. 3 M. & S. 371. *Pickstock v. Lyster*.

take out execution upon the real lien, the charge must be equally against both, and the *scire facias* against both. But it was said, that if he brings *scire facias* against both and has judgment upon it, he may have a *feri facias* against the survivor only, or an *elegit* against both. 1 Lev. 30. *Smarte v. Edsun*. S. C. Sir T. Raym. 26. 3 Bac. Abr. 698. 4 Bac. Abr. 419. See further for this distinction between a real and personal execution, that a personal execution survives, but a real does not. 3 Rep. 14. Sir William Harbert's case. 1 Salk. 320. *Pennoir v. Brace*. Carth. 105. *Panton v. Hall*.

Posterne against Hanson and Hooker, sheriff of Middlesex. Case 8.

Trinity, 21st of King Charles the 2d. Rol. 465.

MIDDLESEX, to wit, Be it remembered that heretofore to wit, in Hilary term in the 19th and 20th years of the reign of our lord Charles the 2d, now king of England, &c. before our said lord the king at Westminster, came Thomas Posterne, by John Hawkins his attorney, and brought here into the court of our said lord the king then there, his certain bill against Sir Robert Hanson, knt. and Sir William Hooker, knt. late sheriff of the county of Middlesex, in the custody of the marshal, &c. of a plea of trespass upon the case, and there are pledges of prosecution, to wit, John Doe and Richard Roe, which said bill follows in these words, that is to say; Middlesex, to wit, Thomas Posterne complains of Sir Robert Hanson, knt. and Sir William Hooker, knt. late sheriff of the county of Middlesex, being in the custody of the marshal of the marshalsea, of our lord the king, before the king himself, for this, to wit, that whereas by a certain act made and provided in the parliament of the lord Henry the 6th, after the conquest, heretofore king of England, holden at Westminster in the said county of Middlesex, the 25th day of February in the 23d year of his reign, it was (among other things) enacted by the authority of the said parliament, that the sheriff, under-sheriff, sheriff's clerk, steward or bailiff of franchise, servant or bailiff, or coroner, should not take any thing by colour of his office, by him, nor by any other person to his use, of any person for the making of any return or panel, and for the copy of any panel beyond 4d.; and that the said sheriffs, and all other officers and ministers aforesaid, should let out of prison all manner of persons by them, or

Stat. 23 H. 6.
c. 9.

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M. D. gave his
bond to the
plaintiff for
240l. ;

the money not
being paid,

plaintiff sued
out a bill of
Middlesex
against M. D.,

which is set out.

any of them, arrested, or being in their custody, by force of any writ, bill or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons having sufficient within the counties where such persons should be so let to bail or mainprise, to keep their days in such places as the said writs, bills or warrants should require, as by the said statute (among other things) more fully appears; and it was further enacted by the said act (among other things) that if the said sheriffs return upon any person *cepi corpus*, or *reddidit se*, that the said sheriffs should be chargeable to have the bodies of the said persons at the days of the returns of the said writs, bills or warrants, in such form as they were before the making of the said act, as by the said statute (among other things) more fully appears: after the making of which said act, one *Michael Drew* esq. on the 8th day of *August* in the year of our lord 1664, at *Westminster*, in the said county, by the name of *Michael Drew*, of the *Middle Temple*, esq. by his certain writing obligatory, sealed with the seal of him the said *Michael*, bearing date the same day and year, became held and bound to the said *Thomas Posterne* by the name of *Thomas Posterne* of *London*, victualler, in 240l. of lawful money of *England* to be paid to the said *Thomas Posterne*, when he should be thereto required, as by the said writing obligatory more fully appears. And whereas also the said 240l. not being paid to the said *Thomas* according to the force, form, and effect of the said writing obligatory, whereby the said writing obligatory became forfeited, he the said *Thomas* for the execution and recovery of his said debt in the said writing obligatory above mentioned and specified, afterwards, to wit, on the 27th day of *July*, in the 19th year of the reign of our lord *Charles* the 2d, now king of *England*, prosecuted out of the court of our said lord the now king before the king himself, called the king's bench (the said court then being at *Westminster* aforesaid in the said county of *Middlesex*) a certain precept of our said lord the king, called a bill of *Middlesex*, against the said *Michael Drew*, directed to the said Sir *Robert Hanson* and Sir *William Hooker* then sheriff of the said county of *Middlesex*, by which said precept our said lord the king commanded the said Sir *Robert Hanson* and Sir *William Hooker*, then sheriff of the said county of *Middlesex*, that he the said sheriff should take the said *Michael* if, &c. and him safely, &c. so that he should have his body before

our said lord the king at *Westminster* aforesaid, on *Tuesday* next, after three weeks of *St. Michael* then next following, to answer the said *Thomas Posterne* of a plea of trespass, and (1) also to a bill of him the said *Thomas* to be exhibited against the said *Michael* for the said 240*l.* according to the custom of the court of our said lord the king before the king

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(1) The clause of *ac etiam* was inserted in the bill of *Middlesex*, and *latitat*, in consequence of the statute 13 Car.2. c.2. s. 2. in order to preserve the jurisdiction of the court of king's bench over civil causes, where a party was to be arrested for above 40*l.*; for that statute enacts, "that no person arrested by any sheriff, &c. by force or color of anyailable writ, bill or process, issuing out of the courts of king's bench and common pleas, or either of them, wherein the certainty and true cause of action is not expressed particularly, shall be compelled to give security, or to enter into a bond with sureties for his appearance, in any penalty or sum of money exceeding the sum of 40*l.*; but the sheriff, &c. shall let to bail every person by him arrested upon any such writ, bill or process, wherein the certainty and true cause of action is not particularly expressed, upon security in the sum of 40*l.* and no more, for his appearance." We may remember, that the bill of *Middlesex*, or *latitat*, was framed only for actions of trespass and frauds, (see ante, p. 1. note (1); therefore regularly a defendant could not be arrested and holden to bail by virtue thereof for breaches of civil contracts. The practice however before the statute was, to arrest and hold the defendant to bail, upon a common bill of *Middlesex*, or *latitat*, for any sum of money without expressing the particular cause of action, though the sheriff might, if he would, have taken a bond of the defendant for 40*l.* only for his appearance under the

statute 23 H.6. c.9. (see post, 53); and this perhaps was the reason why the legislature by the before-mentioned statute still authorised an arrest for the sum of 40*l.* without expressing the certainty and true cause of action, or according to the modern phrase, without an *ac etiam* clause in the process by which the defendant is arrested. Cro. Jac. 286, 287. *Villiers v. Hastings*. 1 H. Black. 310. *Lockwood v. Hill*. To remedy this mischief, the statute 13 Car.2. was made, and the court of king's bench would thereby have been deprived of its jurisdiction of arresting and holding to bail for a sum exceeding 40*l.* if the officers of the court had not, almost immediately after the passing of the act, hit upon the expedient of inserting in their process an *ac etiam*, or special clause, expressing the true cause of action, in addition to the general complaint of trespass; the form of which is the same with that in this entry. In imitation of which, lord chief justice *North*, a few years afterwards, in order to save the suitors of his court the trouble and expence of suing out special originals, directed that, in the common pleas, besides the usual complaint of breaking the plaintiff's close, a clause of *ac etiam* might also be added to the writ of *capias* containing the true cause of action; as, "that the said C. (the defendant) may answer to the plaintiff of a plea of trespass in breaking his close: and also (*ac etiam*,) may answer him according to the custom of the court, in a certain plea of trespass upon the case upon promises, to

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Plaintiff sued
out such pre-
cept with an in-
tent that M. D.
might be ar-
rested by virtue
thereof,

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and either be
committed to
the custody of
the marshal or
put in bail.

himself, and that he should have there then that precept; which said precept he the said *Thomas Posterne* in form afore-
said prosecuted, out of the said court of our said lord the
king before the king himself against the said *Michael Drew*,
with the intent that the said *Michael* might be arrested and
taken, by virtue of the said precept, to appear in the said
court of our said lord the king before the king himself, on
the said *Tuesday* next after the said three weeks of *St. Michael*,
being the day of the return of the said precept to answer the
said *Thomas Posterne* of the plea of trespass and bill afore-
said, according to the exigence of the said precept; and that
the said *Michael* upon such his appearance there might be
committed to the custody of the marshal of the marshalsea
of our said lord the king before the king himself, or put in
sufficient bail in the said court of our said lord the king,
before the king himself, according to the course and custom
of the said court used from time whereof the memory of man

"the value of 20l. &c." 3 Black.
Com. 288. [a]

Upon this statute the court of king's
bench made a rule, that no attorney
should make any precept or writ with a
clause of *ac etiam*, &c. against an heir,
executor or administrator, nor in any
case where, by the course of the court,
special bail was not required. R. M.
15 Car. 2. s. 2.

The words, "*of a plea of trespass*,"
were formerly held to be material, and
it was necessary to insert them in the
bill of *Middlesex*, or *latitat*, 2 Str. 1072.
Caswall v. Martin; but they are now
considered as mere matter of form;
therefore where a motion was made to
stay proceedings on a bill of *Middlesex*,

which was in a plea of *debt* only, and
not of *trespass*, with an *ac etiam* in debt,
the court ordered the bill to be amended,
by inserting the plea of *trespass*. 1 Black.
Rep. 462. *Cox v. Mundy*. And in a
subsequent case, where the bill of *Mid-
dlesex* was to answer the plaintiff in a
plea of *debt*, instead of *trespass*, and also
to a bill to be exhibited in a plea of
trespass upon the case, the court refused
to grant a rule for setting it aside on the
authority of a case, which was read
from the master's book exactly similar.
Mich. 20 Geo. 3. 2 Term. Rep. 513.
Barber v. Lloyd — and the same ap-
plication had been also refused in H.
24 Geo. 3. Ibid. note (a.) [b].

[a] See further on this subject Lord
Chief Justice *Hale's* Discourse con-
cerning K. B. and C. B., published in
Hargrave's Law Tracts, p. 360. and
North's Life of Lord Keeper Guildford,
p. 190.

[b] A bill of *Middlesex* requiring the
defendant to appear before us is good.

Tidd, 171. But an omission of the sum
for which the defendant was arrested,
or that it was due on promises, is irre-
gular, and the defendant cannot be
holden to special bail thereon. 2 East,
305. *Davison v. Frost*, 1 Chitty's R. 711.
Munroe v. Howe.

is not to the contrary, at the suit of him the said *Thomas Posterne*, in the plea and bill aforesaid; and likewise with the intent that he the said *Thomas Posterne*, upon such appearance, commitment, or bail, in form aforesaid had and put in, might exhibit his bill and declaration against him, for the recovery of his said debt according to the course and custom used in the said court from the time aforesaid, and thereupon recover his debt aforesaid against the said *Michael* according to a due course of law: which said precept he the said *Thomas Posterne* afterwards and before the return thereof, to wit, on the said 27th day of *July* in the 18th year aforesaid, at *Westminster* in the said county of *Middlesex*, delivered to the said Sir *Robert Hanson* and Sir *William Hooker*, then being sheriff of the said county of *Middlesex*, to be by them executed in due form of law; by virtue of which said precept, they the said Sir *Robert* and Sir *William*, then being sheriff of the said county of *Middlesex*, afterwards and before the return thereof, to wit, on the day and year last aforesaid, at *Westminster* aforesaid, in the said county of *Middlesex*, took and arrested the said *Michael Drew*, and then and there had and kept him the said *Michael* then and there in prison under his custody, by virtue of the said precept, at the suit of him the said *Thomas Posterne*; and the said *Michael* being so as aforesaid in prison for the cause aforesaid under the custody of the said Sir *Robert Hanson* and Sir *William Hooker* then sheriff of the said county of *Middlesex*, and the said *Michael* being in form aforesaid indebted to the said *Thomas* in the said 240*l.* the said Sir *Robert Hanson* and Sir *William Hooker*, then being sheriff of the said county of *Middlesex* as aforesaid, not considering the duty of his said office, but contriving and fraudulently intending not only to aggrieve him the said *Thomas* in the said premises, and to deprive him of the benefit of the said arrest, and of his competent remedy for the recovery of the said 240*l.* afterwards, to wit, on the day and year aforesaid, the said *Michael Drew* then in form aforesaid being on that occasion in the said prison under the custody of the said Sir *Robert Hanson* and Sir *William Hooker*, then being sheriff of the said county of *Middlesex*, they the said Sir *Robert Hanson* and Sir *William Hooker*, then in form aforesaid being sheriff of the said county of *Middlesex* at *Westminster* aforesaid, in the county aforesaid, let him the said *Michael* to bail upon the security of a certain writing obligatory of 40*l.* of lawful money of

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Precept delivered to defendants being sheriff of Middlesex,

who arrested the said M. D.

Breach,

that the sheriff let him the said M. D. to bail upon security by bond of 40*l.* for his appearance at the return of the precept.

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The sureties in-
sufficient,

and M. D. did
not appear at
the return of the
said precept,
and justify bail.

Plea.

Defendants set
out the act of
23 H. 6. c. 9.

England, made, sealed, and delivered by the said *Michael Drew* and one *Obedia Allen*, and one *Richard Lee* to the said Sir *Robert Hanson* and Sir *William Hooker*, then sheriff of the county aforesaid, for the appearance of him the said *Michael* according to the exigence of the precept: whereas in truth the said *Obedia* and *Richard* were not reasonable sureties, nor had they the said *Obedia* and *Richard* a sufficient estate, at the time of making the said writing obligatory, or ever afterwards hitherto within the said county, nor did the said *Michael* appear in the said court of our said lord the king before the king himself, on the said day of the return of the said precept, or ever afterwards hitherto, and justify sufficient bail in the said court at the suit of the said *Thomas Posterne*, according to the exigence of the said precept; by reason whereof he the said *Thomas Posterne* has totally lost and been deprived of all remedy of recovering his said debt; wherefore he the said *Thomas Posterne* says that he is injured, and has sustained damage to the value of 40*l.* and therefore he brings suit, &c.

And now at this day, to wit, on *Friday* next after the morrow of the *Holy Trinity* in this same term, until which day the said Sir *Robert* and Sir *William* had leave to imparl to the said bill, and then to answer, &c. before our lord the king at *Westminster*, come as well the said *Thomas* by his said attorney, as the said Sir *Robert* and Sir *William* by *William Hastings* their attorney. And the said Sir *Robert* and Sir *William* defend the wrong and injury when, &c. and say, that the said *Thomas Posterne* ought not to have or maintain his said action thereof against them the said Sir *Robert* and Sir *William*, because they say, that at the parliament of the lord *Henry* the 6th after the conquest, heretofore king of *England*, holden at *Westminster* in the county of *Middlesex*, on the 25th day of *February* in the 29d year of his reign, the said lord the king, considering the great perjury, extortion and oppression, which then were, and had been, in this realm, by sheriffs, under-sheriffs and their clerks, coroners, stewards of franchises, bailiffs and keepers of prisons, and other officers, in divers counties of this realm, ordained (among other things) by authority of the said parliament, in eschewing of all such extortion, perjury, and oppression, that no sheriff should let to farm in any manner his county, nor any of his bailiwicks, hundreds, nor wapentakes; nor that the said sheriffs, under-sheriffs, bailiffs of franchises, nor any other bailiff should re-

turn, upon any writ or precept to them directed to be returned, any inquest in any panel thereupon to be made, any bailiffs, officers or servants to any of the officers aforesaid, in any panel by them so to be made; nor that any of the said officers and ministers, by occasion, or under colour of their office, should take any other thing by them, nor by any other person to their use, profit or avail, of any person by them, or any of them to be arrested, or attached, nor of any other for them, for the omitting of any arrest or attachment to be made by their body, or of any person by them or any of them, by force or color of their office, arrested or attached, for fine, fee, suit of prison, mainprise, letting to bail, or shewing any ease or favour to any such person so arrested, or to be arrested, for their reward or profit, except such as follows; that is to say, for the sheriff 20 pence; the bailiff who should make the arrest or attachment four-pence; and the gaoler, if the prisoner should be committed to his ward, four-pence; and that the sheriff, under-sheriff, sheriff's clerk, steward or bailiff of franchise, servant or bailiff, or coroner should not take any thing by color of his office by him, nor by any other person to his use, of any person for the making of any return or panel, and for the copy of any panel, not above four-pence; and that the said sheriffs, and all other officers and ministers aforesaid should let out of prison, all manner of persons by them, or any of them arrested, or being in their custody, by force of any writ, bill or warrant, in any action personal, or by cause of indictment or trespass, upon reasonable sureties of sufficient persons, having sufficient within the counties where such persons should be so let to bail or mainprise, to keep their days in such places, as the said writs, bill or warrants should require, such person or persons who then were, or should be in their ward by condemnation, execution, *capias utlagatum*, or *excommunicatum*, surety of the peace, and all such persons who then were, or should be, committed to ward by the special commandment of any justice, and vagabonds refusing to serve according to the form of the statute of laborers, only excepted: and that no sheriff, nor any of the officers or ministers aforesaid, should take or cause to be taken or made, any obligation for any cause aforesaid, or by color of their office, but only to themselves, of any person, nor by any person who should be in their ward, by the course of the law, but by the name of their office, and upon condition written that the said prisoners should appear at the day con-

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Defendants ar-
rested M. D. by
virtue of the
said precept,

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whereupon the
said M. D. and
O. A. and R. L.
gave a bail-bond
in 40l. to the
defendants for
appearance of
the said M. D.
at the return of
the said precept.

tained in the said writ, bill or warrant, and in such places as the said writs, bills or warrants should require; and if any of the said sheriffs, or other officers or ministers aforesaid should take any obligation in any other form by color of their office, that then it should be void; and that if the said sheriffs should return upon any person *cepi corpus*, or *reddidit se*, that they should be chargeable to have the bodies of such persons at the days of the return of the said writs, bills or warrants, in such form as they were before the making of the said act, as by the said act (among other things) more fully appears. And the said Sir Robert and Sir William in fact say, that after the making and publishing of the said act, and after the suing out of the said bill of *Middlesex* in the said declaration of the said Thomas Posterne above specified, and also after the delivery of the said bill to the said Sir Robert and Sir William, then sheriff of the said county of *Middlesex*, and before the return of the said bill of *Middlesex*, to wit, on the 27th day of *July* in the 18th year of the reign of our said lord the now king, at *Westminster* aforesaid, in the said county of *Middlesex*, they the said Sir Robert and Sir William, then being sheriff of the said county, took and arrested the said Michael Drew by virtue of the said precept, and him the said Michael Drew kept and detained in their custody by virtue of the said precept; and the said Michael Drew so being in the custody of them the said Sir Robert and Sir William, then being sheriff of the said county, for the cause aforesaid, he the said Michael Drew, and one Obedia Allen and one Richard Lee, by the names of Obedia Allen of *Great Tower-hill* and the liberties of the *Tower*, merchant, otherwise called, Obedia Allen, of *Great Tower-hill* and the liberties of the *Tower*, merchant, and Richard Lee citizen and grocer of *London*, otherwise called Richard Lee citizen and grocer of *London*, then being the sureties of him the said Michael Drew, in pursuance and performance of the said clause of the said act of parliament, afterwards and before the return of the said precept, to wit, on the day and year last mentioned, at *Westminster* aforesaid, in the county aforesaid, by their certain writing obligatory, sealed with their seals, bearing date the day and year last mentioned, became bound jointly and severally to them the said Sir Robert and Sir William, then being sheriff of the said county, by the names of Sir Robert Hanson knt. and Sir William Hooker, knt. sheriff of the said county, in the sum of 40l. of lawful money of *England*, with a condition unde-

written to the said writing obligatory, that if the said *Michael Drew* should appear before our lord the king at *Westminster*, on *Tuesday* next after three weeks of *St. Michael* then next following, to answer the said *Thomas Posterne* of the said plea of trespass, and also to the bill of him the said *Thomas* to be exhibited against the said *Michael* for 240*l.* of debt, according to the custom of the court of the said lord the king before the king himself, that then the said obligation should be void, otherwise it should remain in full force; which said writing obligatory, in form, and for the cause aforesaid made by the said *Michael Drew*, *Obedia Allen* and *Richard Lee* to them the said *Sir Robert* and *Sir William*, being sheriff of the said county, at the time of making the said writing obligatory, was a reasonable security of sufficient persons; the said *Michael Drew*, *Obedia Allen* and *Richard Lee* then, to wit, at the time of making the said writing obligatory, having sufficient estate within the said county of *Middlesex*, to wit, at *Westminster* aforesaid, in the county of *Middlesex* aforesaid; whereupon they the said *Sir Robert* and *Sir William*, then being sheriff of the said county, afterwards and before the return of the said precept, to wit, on the day and year last mentioned, at *Westminster* aforesaid, in the county aforesaid, then and there let out of their said prison upon the said bail and mainprise, by the said writing obligatory in form aforesaid made, the said *Michael Drew* by them the said *Sir Robert* and *Sir William* so as aforesaid arrested, and then as aforesaid detained in their custody for the cause aforesaid by virtue of the said precept, and permitted him to go at large according to the exigence of the said act; and they the said *Sir Robert* and *Sir William*, then being sheriff of the said county, afterwards and before the return of the said bill of *Middlesex*, to wit, on the day and year last mentioned, at *Westminster* aforesaid, in the county aforesaid, returned upon the said precept into the court of our said lord the king, before the king himself, that he, by virtue of the said precept to him directed, had taken the body of the said *Michael Drew*, whose body he had ready before our said lord the king at the day and place mentioned in the said precept, as they the said *Sir Robert* and *Sir William*, then being sheriff of the county of *Middlesex*, lawfully might by force of the said act, and according to the ancient course of law in such case used, as well before, as after, the making of the act aforesaid. And this they the said *Sir Robert* and *Sir William* are ready to verify; wherefore

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The bond was a
reasonable security;

whereupon defendants let the
said M. D. out
of their custody,
on bail;

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and returned
cepi corpus, and
paratum habeo.

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Averment, that it is the constant practice for sheriffs to let to bail persons arrested by them on mesne process out of any of the courts at Westminster, and to return *cepi corpus* and *paratum habeo*,

and if the person let to bail did not appear, the sheriff was amerced from time to time until he did appear.

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they pray judgment if the said *Thomas Posterne* ought to have or maintain his said action thereof against them, &c. : with this that they the said *Sir Robert* and *Sir William* will verify that it now is, and always has been the constant and uniform usage and practice, as well of this court, as of all other the courts of our lord the now king, his ancestors, and predecessors, kings and queens of *England*, at *Westminster* aforesaid, at all times, as well before the making of the said act of parliament, as after the making and publishing of the said act, hitherto, that if any sheriff of any county of this realm of *England*, had at any time taken and arrested any person or persons upon any writ of *capias ad respondendum* issuing out of any court at *Westminster* aforesaid and to him directed; or if any sheriff of *Middlesex* had at any time taken and arrested any person or persons upon any bill of *Middlesex*, issuing out of the court of our said lord the king before the king himself, and to him directed: that he and they should let to bail such person or persons so taken and arrested according to the form and exigence of the said act: and that such sheriff, as well from time whereof the memory of man is not to the contrary, until the time of the making of the said act, as at all times after the making and publishing thereof, has used and been accustomed to return upon such writ, or bill of *Middlesex* respectively, that he the said sheriff had taken the body of such person so arrested, and had his body before our lord the king or his justices at *Westminster* respectively, at the day and place contained in such writ or bill of *Middlesex*, according to the exigence of the said writ or bill of *Middlesex*, and as by the said writ or bill of *Middlesex* he was required: and if such person so taken and arrested, and let to bail according to the form of the said act, did not appear at such day and place contained in the writ or bill of *Middlesex*, that then such sheriff or bailiff who had made such return used to be amerced (2)

(2) The same point is recognized by *Eyre C. J.* who says, "that if the sheriff has let the party out of prison upon bail, he must return *cepi corpus*, and having made that return, he is chargeable by the statute 23 H. 6. c. 9. to have the body of the person at the day of the return according to the course of the court: if he has not the body to produce, he is to be amerced, and then, and not until then, he may put the bond in suit to reimburse himself. This is laid down in Dalton's sheriff, c. 37. and is the ancient course of proceeding in all cases where the sheriff had not the body ready after his return of *cepi corpus*, though I have not been able to trace when the mode of proceeding by attachment against the sheriff was

from time to time until the said person so arrested did appear to such writ or bill of *Middlesex*, and was not used or accustomed to be impleaded in the said court, or in any other court for the non appearance of such person so making default, or for his said return upon such default, &c.

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Demurrer.

And the said *Thomas Posterne*, says that he, by any thing by the said *Sir Robert* and *Sir William* above in pleading alleged, ought not to be barred from having his said action thereof against them the said *Sir Robert* and *Sir William*, because he says, that the plea aforesaid by them the said *Sir Robert* and *Sir William* in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in law to bar him the said *Thomas Posterne* from having his said action thereof against the said *Sir Robert* and *Sir William*, to which said plea the said *Thomas* has no necessity, nor is he bound by the law of the land in any manner to answer; and this he is ready to verify: wherefore for want of a sufficient answer in this behalf, the said *Thomas Posterne* prays judgment and his damages on occasion of the premises to be adjudged to him, &c. And for causes of demurrer in law upon the said plea, the said *Thomas*, according to the form of the statute in such case lately made and provided, shews, and to the court here sets forth, the causes following, that is to say, for that the said *Sir Robert* and *Sir William* have not sufficiently alleged in their said plea, that the bail in their said plea above mentioned were sufficient bail, but by implication and not positively, and for that the said plea wants form, &c.

Special causes.

And the said *Sir Robert Hanson* and *Sir William Hooker* say, that the said plea by them in manner and form aforesaid above pleaded, and the matter in the same contained are good and sufficient in law, to bar the said *Thomas Posterne* from having his said action against them the said *Sir Robert* and *Sir William*, which said plea and the matter in the same contained, the said *Sir Robert* and *Sir William* are ready to verify and prove, as the court, &c. and because the said *Thomas Posterne* does not answer the said plea, nor has hitherto in any wise denied the same, the said *Sir Robert* and *Sir William*, as before, pray judgment, and that the said *Thomas Posterne*

Joinder.

"first substituted in the room of the
"amercement." 2 H. Black. 434. *Bengough v. Rossiter*. Mr. Blackstone, in a
very learned note upon this subject, supposes the proceeding by attachment
to have been substituted at some period
between the years 1724 and 1729. See
434. note (a).

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*Curia advisare
vult.*

may be barred from having his said action thereof against them the said Sir *Robert* and Sir *William*, &c. But because the court of our said lord the king now here is not yet advised of giving their judgment of and upon the premises, a day thereof is given to the parties aforesaid, before our lord the king at *Westminster*, until *Saturday* next after three weeks of *St. Michael*, to hear their judgment of and upon the premises, because the court of our said lord the king is thereof not yet, &c.

[59]
Case 8.

Posterne *against* Hanson and Hooker sheriffs of
Middlesex.

Trinity, 21st of Charles II. Rol. 465.

S. C. 2 Keb. 607.

A sheriff is bound by the statute 23 H. 6. c. 9. to let his prisoner, arrested by mesne process, at large upon reasonable sureties, and he is not subject to an action, although he returns *cepi corpus*. By the words in the statute, "that if the sheriff return *cepi corpus* he shall be chargeable to have the body at the day of the return" is meant only, that he may be amerced to the king for not having the body at the day.

CASE by *Posterne* plaintiff, against *Hanson* and *Hooker*, late sheriff of *Middlesex*, defendants; the plaintiff declares and shews the clause in the statute 23 H. 6. c. 9. by which it is enacted, among other things, "that if the said sheriffs return upon any person *cepi corpus* or *reddidit se*, they shall be chargeable to have the bodies of the said persons at the days of the returns of the said writs, bills or warrants, in such form as they were before the making of this act;" and further shews, that one *Michael Drew* was indebted to him in 240*l.* by bond, and for the recovery thereof he had sued out a bill of *Middlesex* out of the court, returnable on *Tuesday* next after three weeks of *St. Michael*, in the 18th year of the reign of the now king, by force whereof the defendants, before the return of the bill, being sheriff of *Middlesex*, took and arrested the said *Drew*, and had him in their custody, and the defendants afterwards let the said *Drew* to bail and mainprise, upon security of a bond made and entered to the said defendants, then sheriff, by the said *Drew*, and one *Allen*, and one *Lee*, for the appearance of the said *Drew*, at the return of the said bill of *Middlesex*, whereas in truth the said *Allen* and *Lee* were not reasonable sureties, nor had sufficient estates in the said county of *Middlesex*, nor did the said *Drew* appear at the return of the said bill, nor found any bail to answer the action of the plaintiff, whereby the plaintiff has lost the benefit of recovering his debt, whereupon he brought his action.

The defendants plead and shew all the said statute; the

material clause for them, and which the plaintiff had omitted, being, "*that the sheriff shall let at large his prisoners on reasonable sureties of sufficient persons having sufficient within the county;*" and then they shew that the plaintiff sued out the said bill of *Middlesex*, which he delivered to them, being sheriff of *Middlesex*, and that they by force thereof had arrested the said *Drew*, and had him in their custody: but they further shew, that they let him at large upon the security of the said bond (3) of the said *Allen* and *Lee*, then having

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(3) This statute consists of two branches; the first is as to the persons to be let to bail; with respect to whom it is enacted, "*that sheriffs, &c. shall let out of prison all manner of persons by them arrested, or being in their custody, by force of any writ, bill or warrant, in any action personal, or by cause of indictment of trespass, upon reasonable sureties of sufficient persons having sufficient within the counties where such persons be so let to bail or mainprise, to keep their days in such place as the said writs, bills or warrants shall require; persons being in their ward by condemnation, execution, *capias utlagatum*, or *excommunicatum*, surety of the peace, or by special commandment of any justice, and vagabonds refusing to serve according to the statute of labourers, only excepted;*" and the second is, as to the nature and form of the security; with regard to which it is enacted, "*that no sheriff, &c. shall take any obligation for any cause aforesaid, or by color of their office, but only to themselves of any person, nor by any person, who shall be in their ward by course of law, but by the name of their office, and upon condition written, that the prisoners*

"shall appear at the day and place contained in the writ, bill or warrant; and if any sheriff, &c. take any obligation in other form, by color of their office, it shall be void." Upon the first branch of the statute, it was determined in the court of king's bench. 4 Term. Rep. 505. *Bengough v. Rossiter*, and the determination afterwards affirmed in error in the exchequer chamber by all the judges of that court, except *Eyre* C. J. 2 H. Black. 418. that the sheriff has no authority to take a bond for the appearance of persons arrested by him under process issuing upon an indictment at the quarter sessions for a misdemeanor; but only a *recognizance* for their appearance. It has also been resolved by all the judges, (contrary to what had been determined before in the court of K. B. 1 Ld. Raym. 722. *Rex v. Dawes*. S. C. 2 Salk. 608.) that the sheriff cannot take bail on an attachment for a contempt, though a judge at his chambers may, 1 Str. 479. *Anon.* S. P. Com. Rep. 264. *Field v. Workhouse*; nor on an attachment out of chancery, for the statute refers only to process in courts of common law. 1 H. Black. 468. *Studd v. Acton*. [c] But the defendant to a declaration on such a bail bond, after

[c] In 6 Taunt. 569. *Morris v. Hayward*, 2 Marsh. 280. S. C., the court of C. B. held, after taking time to consider,

that bail bonds on an attachment out of chancery, "are neither compellable to be taken by the statute 23 H. 6. nor

POSTERNE v. sufficient within the said county of *Middlesex*, to wit, at
HANSON and *Westminster* within the said county; whereupon they returned
HOOKER. *cepi corpus* at the return of the said bill of *Middlesex*, as ac-
cording to law and practice they ought; and there are several

setting out the condition on oyer, by which it appears to have been taken on an attachment for a contempt, must not demur, for if he do, the court will not presume the sheriff had not any authority to take bail, but must plead the statute 23 H. 6. and state those facts of the case which will bring the question before the court. 2 Vent. 234—238. *Lawson v. Haddock*. Com. Rep. 264. *Field v. Workhouse*. 2 Black. Rep. 955. *Say v. Ellis*. [d.]

It is held not to be necessary, in an action upon a bail bond, to state that the defendant in the original action was

arrested, and if stated, it is not traversable; for the words of the statute 4 Ann. c. 16. s. 20. viz. "and the sheriff taketh bail from such person against whom such writ, bill or process is taken out," are general enough to include the case where the party has not been arrested; and besides it would be attended with mischievous consequence to set aside bail bonds taken civilly without exposing the party to an arrest. 1 Str. 444. *Watkins v. Parry*. Ibid. 643. *Huley v. Fitzgerald*.

The nature and form of the security

"prohibited by the statute; but that they are good at common law; and that whether a bail bond shall be taken or not, is in the discretion of the sheriff, as regulated by the practice of that court." But with respect to an attachment for non-payment of costs, the court of exchequer in a subsequent case, 4 Price 23. *Phelips v. Barrett*, held, that the sheriff cannot take a bail bond, on the ground that the process is in the nature of an execution. This latter case, and the ground of it has, however, been subsequently considered in K. B. 2 B. & A. 56. *Lewis v. Morland*, which was an action against the sheriff for the escape of a person arrested on an attachment for non-payment of costs, and who was let out of custody, but returned before the return-day of the writ; there the court held that the action would not lie, for the attachment is plainly in the nature of mesne process and not of an execution, inasmuch as its object is to bring the defendant into court to answer, not

to satisfy the plaintiff; and Bayley J., speaking of *Morris v. Hayward*, says, "that case was decided upon great consideration, and is at variance with the subsequent case of *Phelips v. Barrett*, the foundation of which was, that an attachment is a process in the nature of execution. But for the reasons I have already given, it seems to me, that an attachment is in the nature of mesne process, and that the principle on which that decision took place cannot be supported."

[d] These decisions seem to have proceeded on the mistaken ground that the stat. 23 H. 6. is a *private* act, but since it has been determined that it is a public act, (post, 155. note) it seems clear that the defendant after oyer of the bond and condition, in any case to which the statute applies, may demur or plead the necessary facts of his case, without pleading the statute. The case above put of a bail bond on an attachment, as appears by the preceding note, is wholly independent of the statute.

other averments not very material, and so conclude their * plea in bar of the action: to which plea the plaintiff demurs in law. POSTERNE v.
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And it was argued for the plaintiff, that the action might * [60]

required by the second branch of the statute, is *by bond*; therefore an *agreement in writing*, made by a third person with the bailiff of the sheriff, to put in good bail, for a person arrested on meane process, on or before the return of the writ, or to surrender the body to the bailiff, or on default thereof to pay debt and costs, in consideration of his discharging the party arrested, is held to be void. Indeed if the security had been *by bond* it would be void, because it has been adjudged that the statute requires the bond to be made to the *sheriff himself as such* by his name of office, and not to the *sheriff's bailiffs*; for though the statute mentions *the bailiff* of a franchise, it means those officers who have the return of process; but where it is directed to the sheriff, the bond must be made to him. And the condition of the bond must be for the appearance of the party at the return of the writ, and for no other purpose; so that if there be any other condition expressed in the bond, or the bond be single without any condition at all, or be with an impossible one, the bond is void by the statute. 1 Term Rep. 418. *Rogers v. Reeves*. Cro. Eliz. 862. *Cotton v. Wale*. Ibid. 672. *Scryven v. Dyther*. Dyer, 119, 120. 10 Rep. 100 a. b. 101 a. *Beawfage's case*. 3 Lev. 74, 75. *Graham v. Crawshaw*. 1 Str. 399. *Mills v. Bond*. S. C. Fort. 363. 2 Term Rep. 569. *Samuel v. Evans*. But the statute is confined to obligations given to *the sheriff*, and does not extend to such as are given to, or

for the benefit of, *the plaintiff*. Therefore where an attorney undertakes to appear for the defendant, he is bound to do so, and the court will enforce a performance of such his contract with the plaintiff, by attachment, though his undertaking be not in the form prescribed by the statute. Cro. Eliz. 190. *Milward v. Clerk*. 1 Sid. 132. *Benskin v. French*. S. C. 1 Lev. 98. 1 Term. Rep. 422. *Rogers v. Reeves*. So a bond given to *the plaintiff* in another form than that which the statute prescribes is valid; the distinction being where the undertaking is to the *plaintiff* and where it is made to the *sheriff*. 2 Mod. 304, 305. *Hall v. Carter*. [e] If it appear on the face of the declaration, or upon oyer, that the bond is void by the provisions of the statute, the defendant may demur; but if it do not he must plead the statute; [f] or, if by pleading or otherwise, the objection appears in any part of the record, he may move in arrest of judgment, 2 Term Rep. 575. *Samuel v. Evans*. If the bond was in truth made to the sheriff *as such*, but by mistake he declares as upon a common bond, and the defendant prays oyer of the bond, and says, "it is read to him, &c." without setting it out, and then prays oyer of the condition, which he sets out at large *in hæc verba*, whereby it appears to be a bail bond, and pleads the statute 23 H. 6. and that the bond was given for ease and favor, the plea will *prima facie* be an answer to the action, because it is not alleged that the bond

[e] 4 East, 568. *Sedgworth v. Spicer*. 2 Smith, 52. *Parker v. England*.

[f] i. e. He must plead such facts as shew that it is void by the statute.

POSTERNE *v.* well be maintained upon the clause of the statute, "that if
HANSON and " the sheriff return a *cepi corpus* or *reddidit se*, &c. he shall be
HOOKER. " chargeable to have the bodies, &c." and here the defend-
ants have let the prisoner at large, and returned *cepi corpus*,

was made to the plaintiff as sheriff; but the plaintiff may make his declaration good in his replication, by praying that the bond may be enrolled, and then setting it out at large, and averring that he was sheriff, &c. the arrest of the defendant, &c. and that the bond was made to him as sheriff, and traversing the ease and favor. Carth. 301, 302. *Abney v. White*. See the form of doing of it, 1 Lutw. 680. 685. *Blewet v. Appleby*. See also 1 Saund. 9 b. *Jevens v. Harridge*, note (1). The bond must also be taken by the sheriff before the return of the writ, otherwise it is void. 1 Ld. Raym. 352. *Pullein v. Benson*. [g]

But it is not required by the statute to insert the nature of the action in the condition of the bond; if it sets forth the parties, and the time and place of appearance substantially, it is sufficient: therefore a mere informality, or variance between the condition and process, in the description of the action, or of the time and place of appearance, does not vitiate the bond. Thus where the condition was to answer the plaintiff in a plea of debt *generally*, but the writ was to answer the plaintiff in a plea of debt *for 320l.* the variance was held not to be material. Cro. Jac. 286. *Villiers v. Hastings*. So where the *latitat* was to answer the plaintiff in a *plea of trespass*, and the condition was to answer the plaintiff *generally*, without mentioning any plea, it was held to be no objection; for no other action shall be intended, the statute only requiring an

appearance, and not the words *ad respondendum*, &c. which are mere surplusage. 2 Lev. 123, 124. *Kirkebridge v. Wilson*. So where the condition was to appear in trespass of 100l. but the writ was in a plea of trespass, *and also to a bill of debt of 100l.* the bond was held good; for by Holt C. J. the appearance, the day, the court and the party at whose suit, &c. are well expressed as they should be. 2 Show. 51. *Gardiner v. Dudgate*. And where the writ was to answer the plaintiff in a plea of trespass, *and also to a bill for 100l. of debt*, and the condition was to answer in a plea of trespass of 100l. the variance was held to be immaterial. Sir T. Jones, 137, 138. *Cudwell v. Dunkin*. So where a writ was in a plea of trespass, *and also to a bill*, and the condition was in a plea of trespass only, the bond was nevertheless held good. 6 Mod. 122. *Grovenor v. Soame*. So an objection, that in the condition of the bail bond it was not said *whose bill* the defendant was to answer, was over ruled, and Parker C. J. said, that the statute only requires that the sheriff should take a bond conditioned for the appearance of the party such a day at *Westminster*; it does not say even to answer the plaintiff. 10 Mod. 327. *Rench v. Britton*. So where the process was in an action *of trover*, and the condition was to appear to answer in a *plea of trespass on the case upon promises*; though it was urged to be at variance, the court said "*the respondendum* is only surplusage, " and shall be rejected." Fort. 368.

[g] So it is void if executed before the condition be filled up. 3 Campb. 181. *Powell v. Duff*.

therefore by the express words of the statute they are chargeable with the body of the prisoner. For before the making of the statute, if the sheriff had taken a prisoner by writ, and let him at large, and afterwards returned *cepi corpus*, it is clear that he was chargeable to the action of the party, either for an escape or for a false return, at the election of the party grieved (4); so it was concluded it should be in the present case.

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If a sheriff before the statute 23 H. 6. had arrested a person upon mesne process, and let him at large, and afterwards

returned *cepi corpus*, he was liable to an action either for an escape or for a false return.

Davenport v. Parker. And where the sheriff, upon an original writ in a plea of trespass upon the case upon promises, took a bail bond conditioned for the defendant's appearance in a plea of *trespass*, the court held it to be valid. 6 Term Rep. 702. *Owen v. Nail.* It should seem therefore from these authorities that the case of *More v. Finch.* 2 Lev. 177. where it was held, that the bond was void because the condition did not state whose bill the defendant was to answer, is not law. So with respect to the place of appearance, it has been adjudged that the condition of the bond for the defendant to appear before his majesty's justices of the king's bench at Westminster was no variance from the writ, which was to appear before our lord the king at Westminster. 2 Lev. 180. *Kirkhide v. Dyke.* S. P. 2 Vent. 237. *Lawson v. Haddock.* And where the writ by original was returnable before our lord the king, wheresoever he should then be in England, and the condition was without the words wheresoever, &c. the court said that there are no set forms

of words for those bonds, but if in substance they are to appear according to the design of the writ, it was sufficient: and they cited a case, where the condition of the bond was to appear in the office of pleas in the court of exchequer at Westminster, and held well, though the process was to appear before the barons, and that they would understand that by appearing before the king, was meant before the king in his court, and not before the king in his person, and judgment was given for the plaintiff. 2 Str. 1155. *Shuttleworth v. Pilkington.* S. C. cited in 1 Term Rep. 240. *King v. Pippett.* [h]

If the defendant does not appear at the return of the writ according to the condition; that is, if he does not put in and perfect bail above in due time, the bail bond is forfeited; and the plaintiff may either take an assignment of it, or proceed against the sheriff to compel him to return the writ, and bring in the body of the defendant, or in other words to put in and perfect bail. If the bail below are sufficient, it is usual for

[h] So where the writ was to appear before the king wheresoever, &c. and the condition before the king at Westminster it was held good. 9 East, 55. *Jones v. Stordy.* See also 3 B. Moore, 214. *Bonfellow v. Steward.* But where the writ was to appear before his majesty's justices of the bench at Westminster, and

the condition before the king at Westminster, the variance was held fatal, for they are different courts; 6 Taunt. 551. *Renalds v. Smith*; 2 Marsh. 258. S. C.; for which difference see 3 M. & S. 166. *Impey v. Taylor.* 7 Taunt. 271. *Mil. v. Pollon.* 1 B. Moore, 19. S. C.

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The sheriff is bound by the statute to let a prisoner at large, on reasonable sureties, and therefore not liable to an action for so doing.

If the sheriff return *cepi corpus*, but has not the body at the day, he is to be amerced.

At the common law a person arrested by writ could only be delivered by writ *de homine replegiando*, and if the sheriff detained him and returned *cepi corpus*, but had not his body in court at the return of the writ, he was amerced. So it is now since the statute.

But it was answered and resolved by the court, that the action does not lie, because now the sheriff is compellable by the statute to let the prisoner at large, upon reasonable sureties, &c. (5); therefore when the law compels the sheriff to do so, he shall not be subject to an action for doing his duty in obedience to the law. And though in the time of the late disorder, there was an opinion that such action lies, yet the court altogether condemned such opinion, and said, that the law was clearly otherwise. (6) And as to the clause of the statute, that if the sheriff return *cepi corpus*, he shall be chargeable to have the body, &c. it is to be understood that the sheriff may be (7) amerced for not having the body at the day; and because he is liable to be amerced to the king for not having the body, the statute gives him advice that the sureties shall have sufficient within the county for his indemnity. And at common law if the sheriff had arrested any man by the king's writ, the prisoner could only be delivered by writ *de homine replegiando*, as *Twysden* justice said, and as the law seems to be (8); and if the sheriff had arrested a prisoner, and detained him in his custody, and, at the day of the return of the writ, returned *cepi corpus*, but had not the body in court, the sheriff would have been amerced; but the party could not have maintained an action against him; so now the statute compelling him to let the prisoner at large upon reasonable sureties, &c. and if he do so, as it is averred in his plea he did, he shall be in the same condition as if at com-

the plaintiff to take an assignment of the bail bond, which, it seems, he cannot do after service of the rule to bring in the body, because he has made his election to proceed against the sheriff. Imp. K. B. 126, 127. 4th edit. [i] But if the plaintiff takes an assignment of the bail bond, he discharges the sheriff, and the court will not grant a rule upon him to return the writ. Gilb. C. P. 21. 1 Salk.

99. *Etherick v. Cowper*. 1 Wils. 223. *Ld. Brook v. Stone*. So by taking such assignment, if the bail to the sheriff become bail above, the plaintiff cannot except to them, for the acceptance of the assignment is an admission of the sufficiency of the bail. 1 Salk. 97. *Anon.* 7 Mod. 62. *Fish v. Horner*. Ibid. 117. *How v. Granville*. 6 Mod. 122. *Governor v. Soame*. [j]. By statute 4 Ann.

[i] Mr. *Tidd* in his Practice, p. 319. citing *Robertson v. Owen*, M. 36 Geo. 3.; *Poidevin v. Harvey*, M. 51 G. 3. K. B.; 3 Bos. & Pull. 564. *Wright v. Walker*, says that he may take an assignment after service of the rule to bring in the body: and it should seem that the prac-

tice of K. B. is so. But it is otherwise in C. B. 1 Bing. 181. *Blackford v. Hawkins*.

[j] But if the bail be excepted to before an assignment of the bond be taken, they are bound to justify notwithstanding such assignment. 11 East,

mon law he had detained the prisoner in his custody, and shall only be amerced to the king for not having the body of the prisoner, as he would have been before the statute, when he kept the prisoner in his custody. Wherefore it was adjudged for the defendants by the whole court. *Winnington* for the plaintiff; *Saunders* for the defendants. POSTERNE v. HANSON and HOOKER.

Note—It was agreed by the whole court, that the averment by these words, namely (*), “the said *Obedia Allen* and *Richard Lee* having (†) sufficient within the said county, to wit, at “*Westminster* aforesaid, &c.” was as well as if it had been by the words “*That the said Obedia Allen and Richard Lee had* sufficient within the said county, &c. (9)

The words “*O. and R. having* “sufficient” are as good words of averment as “that the said *O. and R. had* “sufficient.” See p. 55.

† [61]

c. 16. s. 20. it is enacted, “that if any person shall be arrested by any writ, bill or process issuing out of any of the courts of record at *Westminster*, at the suit of any common person, and the sheriff or other officer taketh bail from such person against whom such writ, bill or process is taken out, the sheriff or other officer at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail bond, or other security, taken from such bail, by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses, which may be done without any stamp, provided the assignment so endorsed be duly stampd before any action be brought thereupon; and if the said bail bond, or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after such assignment made, may bring an action and suit thereupon in his own name, and the court, where the action is brought, may by rule or rules of the same court, give such relief to the plaintiff and defendant in the original action,

“and to the bail upon the said bond or other security taken from such bail, as is agreeable to justice and reason, and that such rule or rules of the said court shall have the nature and effect of a defeasance to such bail bond or other security for bail.” This statute is compulsory upon the sheriff to assign the bail bond at the request of the party, and if he refuses, he is liable to an action upon the case. 7 Term Rep. 122. *Stamper v. Milbourn*. According to the practice of the court of K. B. if the defendant neglects to put in and perfect bail above, and the plaintiff does not declare in the original action within two terms after the return of the writ, he is not held to be out of court, but may still take an assignment of the bail bond, for he is not bound to declare *de bene esse* within the time limited for the defendant’s appearance, and after that time he cannot declare until the defendant has actually appeared. 2 Str 1262, *Merryman v. Carpenter*. Tidd’s K. B. 156. 2d edit.; but in the C. B. the practice is otherwise; for it is held to be the settled practice of that court, that if the plaintiff does not declare within two terms, that is, before the

321. *Hill v. Jones*; and in C. B. it seems that the plaintiff may except

even after he has taken an assignment. Tidd, 279.

essoins day of the third term *inclusive*, after the return of the writ, he is out of court, and therefore cannot take an assignment of the bail bond, for that by the sound construction of the statute of Anne, the suit must be depending when the bail bond is assigned. 2 Black. Rep. 876, 877. *Sparrow v. Naylor*. [k]

It is held that the assignment may be made by the under-sheriff *in the name of the high-sheriff*, as well as by the high sheriff himself, but not by the under sheriff's clerk. 1 Str. 60. *Kilson v. Fagg*. S. C. 10 Mod. 288. [l] And the action may be brought in any county in which the assignment is stated to be made; as if the bail bond be given to the sheriff of S. the assignment may be stated to be made in the county of B. or any other county, and the venue laid there. 2 Str. 727. *Gregson v. Heather*. S. C. 2 Ld. Raym. 1455. [m] And the assignee must bring the action in the same court out of which the process issued, on which the bail bond is taken; for this is necessary in order to give the parties the relief intended by the statute. 1 Burr. 642. *Chesterton v. Middlehurst*. 3 Burr. 1923. *Walton v. Bent*. 3 Wils. 348. *Morris v. Rees*. 2 Black. Rep. 838. S. C. Ibid. 877. S. P.; but the sheriff himself may sue on the bond in any other court. 1 H. Black. 631. *Newman v. Faucett*. However, the court of king's bench decided that the action on the bail bond, whether brought by the sheriff or other officer, to whom it was given, or by the assignee, must be commenced in the court where the original action was brought, assigning as a reason that the statute of Anne gives the power of relief in one case as well

as in the other. 8 Term Rep. 152. *Danally v. Barclay*. [n] The sheriff, or the assignee of the bail-bond, cannot hold to bail, either the defendant or his bail, in an action brought by either of them, on that bond. 6 Term Rep. 336. *Brander v. Robson*. 8 Term Rep. 450. *Mellish v. Petherick*; but if the sheriff or assignee recover judgment against the defendant or his bail, in the action on the bail bond, they may be holden to bail in an action on the judgment. 8 Term Rep. 85. *Prendergast v. Davis*. It is held sufficient for the assignee of the bail bond to state in his declaration that the sheriff assigned the bond to him *according to the form of the statute*, without adding, "that the assignment was under the hand and seal of the sheriff." Willes's Rep. 408. *Dawes v. Papworth*. And the defendant may plead *that he did not assign, &c. according to the form of the statute*, and the plaintiff may tender an issue on it in those words. Ibid. On which he must prove that the assignment was, according to the statute, under the hand and seal of the sheriff. Ibid. The bail to the sheriff are liable to satisfy the whole debt due to the plaintiff to the full extent of the penalty of the bond, though beyond the sum sworn to, and costs; See 2 Ld. Raym. 1564. *Mifflin v. Morgan*; Cowp. 71. *Orton v. Vincent*; 1 H. Black. 76. *Mitchell v. Gibbons* [o]. And each of them is liable for his own costs, as well as those of the original action. And where *several* actions are brought, it is usual, in suing out execution, to apportion the debt and costs in the original action amongst the different defendants, so that a part may be

[k] See ante, vol. i. p. 161. note [b].

[l] Contra, 4 Campb. 36. *Middleton v. Sandford*. Tidd, 322.

[m] See ante, vol. i. p. 74. note [b].

[n] S. P. 2 Campb. 396. *Wright v.*

Walmsley; but no advantage can be taken of the irregularity upon a plea of *non est factum*. Ibid.

[o] S. P. 8 T. R. 29. *Stevenson v. Cameron*. 1 East, 91. note.

levied on each, together with his own costs. Tidd P. K. B. 159. 2d. edit. [*p*] If the defendant does not justify bail in four days *exclusive* after notice of exception to them, the plaintiff may take an assignment of the bail bond [*q*]; but if the fourth day be the last day of the term, and the defendant do not justify his bail before the rising of the court, the plaintiff may take an assignment of the bail bond on that day after the rising of the court. 8 Term Rep. 4. *Dent v. Weston*.

If the *plaintiff* die after the arrest, and before the return of the writ, the court will set aside the proceedings on the bail bond. 8 Mod. 240. *Hutchinson v. Smith*. And where the *defendant* dies before the plaintiff could have had judgment against him, if there has been no delay in putting in and perfecting bail, the court will stay proceedings on the bail bond upon payment of costs only: but where the plaintiff might have had judgment against the defendant, if bail above had been put in and perfected in time, the bail to the sheriff are liable for the whole debt and costs, and the court will not relieve them. Cowp. 71. *Orton v. Vincent*. Where the defendant becomes a *bankrupt* after he has given a bail bond, the bail are not discharged unless he obtains his certificate *before*

they are fixed, for if he obtains his certificate *afterward*, they remain liable. 1 Burr. 244. *Wolley v. Cobbe*. Ibid: 436. *Cockerill v. Owston*. If the defendant surrender himself to the sheriff before the return of the writ, the bond may be cancelled, after which the plaintiff can neither proceed against the sheriff, nor maintain an action against him for not assigning it. 6 Term Rep. 753. *Jones v. Lander*. 7 Term Rep. 102. *Stamper v. Milbourn*. [*r*] And where the bail surrender the principal after the assignment of the bail bond without justifying, and after the expiration of the time allowed them to justify, the court will stay the proceedings on payment of costs. 5 Term Rep. 401. *Edwin v. Allen*. Ibid. 534. *Meysey v. Carnell*. 7 Term Rep. 297. *Hardwick v. Bluck*. [*s*]

(4) S. P. 1 Sid. 23. *Allen v. Robinson*, This must be understood to mean, where the defendant does not put in, and justify, bail at all; for in a late case where the sheriff permitted the party to go at large, *without taking a bail bond*, and returned *cepi corpus*, and, before the expiration of the rule to bring in the body put in bail, it was held that he was not liable to an action, either for an escape or false return. That was an action against the sheriff of *Kent*, in which the

[*p*] As to bringing *several* actions, see ante, vol. i. 161. note [*b*].

[*q*] But it is also necessary that he should *enter* the exception before he takes an assignment; for where the plaintiff had given notice of exception, but omitted to enter it, although the defendant had acted on the notice, the court stayed the proceedings on the bail bond. 1 Chitty's R. 174. *Hodson v. Garrett*.

[*r*] 1 Bos. & Pull. 325. *Maddocks v. Bullcock*; but it is optional with the the sheriff whether he will accept the

surrender or not. 1 East, 383. *Hamilton v. Wilson*. 10 East, 100. *Plymton v. Howell*. In 8 T. R. 456. *Hyde v. Whiskard*, it was held that bail above might be put in before the return of the writ and the defendant surrendered by them to the king's bench prison. See 3 Bos. & Pull. 232. *Harding v. Hennem*; but see Tidd, 248. citing *Forster v. Hyde*, M. 41 Geo. 3. K. B.

[*s*] *Hardwick v. Bluck* is contra, but it is over-ruled in 7 T. R. 529. *The King v. Sheriff of Middlesex*.

first count of the declaration stated that the defendant had arrested one W. J. S. and suffered him to escape, and falsely returned *cepi corpus*, and another count stated that the defendant neglected to arrest the said W. J. S., and falsely returned *cepi corpus*: and on the general issue pleaded, it appeared in evidence that the defendant had actually arrested W. J. S. but afterwards permitted him to be at large without having taken a bail bond, and the plaintiff on the return day ruled the defendant to return the writ, who returned *cepi corpus*, and the defendant being served with a rule to bring in the body, put in bail, and W. J. S. before the expiration of the latter rule surrendered himself in discharge of those bail; it was adjudged that bail having been put in within due time was an answer to the action, the object of ruling the sheriff to return the writ being, to ascertain whether he has arrested the party or not, and if he return *cepi corpus* he must put in bail; that, if the action could be maintained, it would in fact be going to a jury to ascertain whether the court has done right in giving the sheriff the usual time to put in bail; it was a sufficient answer to the action that an appearance was entered; that in this case in Saunders it was said

by the court, that if the sheriff take a prisoner, and detain him in his custody and at the return of the writ return *cepi corpus*, and have not the body in court, he shall be amerced, but the party shall not have an action against him. 2 Bos. & Pull. 35. *Pariente v. Plumtree*. But where the sheriff, who permits the party to go at large without taking a bail bond, has him not at the return of the writ, or in other words, *does not put in and perfect bail within due time*, it is a breach of his duty, for which he is answerable in an action for an escape. 7 Term Rep. 109. *Fuller v. Prest*. 1 Bos. & Pull. 225. *Webb v. Matthew*. 2 Term Rep. 176. 177. *Atkinson v. Matteson*. [f]

(5) And therefore if the defendant tender a bail bond with sufficient sureties, [u] and the sheriff refuse to accept it, he is liable to a special action on the case, but not to an action of trespass, for the refusal does not make him a trespasser *ab initio*. Cro. Car. 196. *Salmon v. Percivall*. Sir W. Jones, 226. 2 Roll. Abr. 561. pl. 9. S. C. Dalt. Sheriffs, 356. 2 Vent. 96. *Bealy v. Sampson*. 1 Sid. 22. *Allen v. Robinson*. 2 Salk. 609. *Rex v. Barlow*. 2 Mod. 91. *Smith v. Hall*. Ibid. 84. *Page v. Tulse*. And the action does not lie

[f] But it is advisable in all cases before bringing an action against the sheriff, to demand an assignment of the bail bond, and to insert in the declaration a count for not assigning the bond: for where the plaintiff was told by a clerk on application at the sheriff's office that no bond had been taken, and brought his action declaring for an escape, and also for not arresting, but had no count for not assigning the bond, and it turned out in evidence that a bond had been taken, the plaintiff was nonsuited and the court refused to relieve him. 5 Taunt. 325. *Mendez v. Bridges*. Indeed it seems

better in all actions against the sheriff for defaults in executing meane process, to insert in the declaration all the three counts above alluded to.

[u] That is, persons having sufficient *within the sheriff's bailiwick*: for where the declaration against sheriffs of London averred that the defendant tendered bail, having sufficient within London and *Middlesex*, and that the defendants were sheriff of *Middlesex* as well as sheriffs of London, it was held bad on demurrer. 15 East, 320. *Lovell v. Plomer*.

against the *bailiff* who refuses, but it must be brought against the sheriff. 2 Mod. 92. *Smith v. Hall*. The clause in the statute, which requires reasonable sureties, was introduced for the benefit of the sheriff, and therefore though he may insist upon two sureties, yet he may take a bond with one surety only. *Sir W. Drury's case*, cited 10 Rep. 100 b. 101 a. *Beawsage's case*. Cro. Eliz. 808. *Clyfton v. Web*. Ibid. 852. *Blackbourn v. Michellbourn*. Ibid. 862. *Cotton v. Wale*. Fort. 369. *Cook v. Brookhurst*. [v]

(6) S. P. Cro. Eliz. 624. *Barton v. Aldeworth*. 1 Roll. Abr. 92. pl. 11. 93. pl. 17. Ibid. 807. (D) pl. 4. Moor, 428. *Laughton v. Gardner*. 1 Sid. 22, 23. *Allen v. Robinson*. Ibid. 439. *Parker v. Welby*. Post, 154. *Benson v. Welby*. 1 Vent. 55. *Anon*. Ibid. 85. *Parker v. Welby*. 1 Mod. 227. *Ellis v. Yarborough*. 2 Mod. 177. S. C. 6 Mod. 122. *Grovenor v. Soame*. 10 Mod. 288. *Kitton v. Fag*. 1 Mod. 240. 244. *Page v. Tulse*. 2 Mod. 83. S. C. 1 Lev. 86. *Bentley v. Hare*. Gilb. H. C. P. 22. 3d. edit. *Ethericke v. Cowper*. 1 Ld. Raym. 425. and 1 Salk. 99., in which what Lord Holt is made to say, that if the sheriff takes insufficient bail, he is liable to an action, as well as to amercements, is not law, and is noticed by *Salkeld* to be contrary to the case of *Grovenor v. Soame*, where it was adjudged, that no action lies against the sheriff for taking insufficient bail, but he shall be amerced if he has not the body.

(7) If the plaintiff chooses to pro-

ceed against the sheriff, rather than take an assignment of the bail bond, he must sue out a rule upon him to return the writ. This rule expires in *four days* next after the service of the rule, in *London and Middleses*, and in six days after, in any other county or city, and is obtained in K. B. from the clerk of the rules, and in C. B. from the secondaries: and is usually taken out on the return day of the writ by bill in K. B. and on the first day of the term, or *quarto die post* of any other return in C. B. and in K. B. when the proceeding is by original, in order to keep pace with the time to put in bail; but it cannot be taken out before that time, though tested in term time, and if it be it is irregular, and an attachment grounded upon it will be set aside. 1 Term Rep. 552. *The King v. Sheriff of Cornwall*. However, as we already observed (note 3), this rule cannot be had after the plaintiff has taken an assignment of the bail bond, if it be valid; for if it be a void bond, as having been executed after the return of the writ, or the like, 2 Term Rep. 569. *Samuel v. Evans*, the sheriff may, notwithstanding such assignment, be ruled to return the writ. 1 Wils. 223. *Lord Brooke v. Stone*. Nor can this rule be taken out where the writ was executed by a *special* bailiff nominated by the plaintiff, or his agent. 2 Black. Rep. 952. *Hamilton v. Dalziel*, whether it be a writ of execution, or on mesne process. 4 Term Rep. 119. *De Moranda v. Dunkin*. [w] As the object of this rule is to bring the sheriff into con-

[v] If more than two sureties be tendered and two of them are each worth property to the amount of the penalty of the bond, it is immaterial what property the others have. 5 M. & S. 223. *Matson v. Booth*: but whether it be sufficient to tender a number of

sureties, whose aggregate property amounts to the penalty of the bond, although no one of them has property to that amount, seems not to be determined.

[w] So where the plaintiff or his agent gives special directions to the

tempt, it must be served *personally* either on him, or his under-sheriff; service on the under-sheriff's agent in *London* has been held to be insufficient: for as six days only are allowed, after the service of the rule, to return the writ, it might be impossible to obey the rule in distant counties, if service on the agent were sufficient. Doug. 420. *The King. v. Coles.* But in *London, Middlesex, and Surrey*, a service on the under-sheriff's agent is held to be sufficient; and the reason assigned is, because the offices of the agents for the under-sheriffs of those counties are considered as the offices of the under-sheriffs themselves; but in these cases if the rule be served on the agent any where *except at the office*, the service will be bad. Ibid.[x] If the sheriff does not return the writ, the court will upon an affidavit, stating that the deponent personally served A. B. who acts as under-sheriff, with a copy of the rule, and at

the same time shewed him the original (which words in italics are held to be essential, 3 Term Rep. 351. *The King v. Smithies*), and that the writ was not filed, grant an attachment against him.[y] If he does return the writ, he must do so on the day on which the rule for returning it expires, and on default thereof, the plaintiff may move for an attachment on the next day. 4 Term Rep. 496. R. G.[z]

The sheriff, having arrested the party, and let him go at large on bail, must return *cepi corpus*, and if bail above be not put in, and perfected, the next step for the plaintiff to take is, to rule the sheriff to bring in the body.[a] This rule too expires in four days after service, in *London and Middlesex*, and in six days after, in every other county, like the rule to return the writ, and must be served in the same manner as that rule is. The object of the rule to bring in the body is to compel the sheriff, when the

sheriff's bailiff. 1 Chitty's R. 619. in note. *Porter v. Viner. Pallister v. Pallister.* But though a special bailiff be appointed to arrest, the sheriff is responsible for the safe custody of the defendant after the arrest is made, and the writ returned. 8 T. R. 505. *Taylor v. Richardson.* 2 Esp. 591. *Beckford v. Welby.*

[x] If the rule to return the writ expires in the vacation, the sheriff has the whole of the first day of the following term to return the writ in K. B. 5 East, 386. *The King v. Sheriff of Berks.* 1 Smith, 427. S. C. *Anon.*; but it is otherwise in C. B. 5 Taunt. 647. *The King v. Sheriff of Middlesex.* 1 Marsh, 270. S. C. The same is the law with respect to the rule to bring in the body. Post, note [e].

[y] Where the sheriff on being ruled gave notice to the plaintiff that the writ was lost, but that the defendant was in

custody, the court of C. B. held it equivalent to a return of *cepi corpus*, and set aside an attachment for not returning the writ. 1 Marsh. 289. *The King v. Sheriff of Kent.*

[z] But where the rule expires on the last day of term, an attachment may be moved for at the rising of the court on that day. 11 East, 591. *The King v. Sheriff of Surrey.*

[a] But where the plaintiff on the return of *cepi corpus*, brought an action against the sheriff for an escape and recovered, the court held that he could not after this rule the sheriff to bring in the body. 2 B. & A. 623. *Borwick v. Walton.* 1 Chitty's R. 393. S. C.; nor can he after having taken a *cognovit* from the defendant, for the defendant appears in court on giving the *cognovit* and the sheriff has done his duty. 1 Taunt. 159. *The King v. Sheriff of Surrey.*

defendant is at large, to put in and perfect bail above. 1 Wils. 262. *Wolfe v. Collingwood*. It must not be taken out until the day *after* the expiration of the rule to return the writ; if it be, the attachment founded upon it will be irregular. 5 Term Rep. 479. *Hutchins v. Hird*. [b] Nor until the time for putting in bail has expired. 2 H. Black. 276. *Rolfe v. Steele*. [c] For if those rules be taken out before, it may happen that the defendant will justify his bail after the sheriff is fixed with the debt and costs, whereby the sheriff will be without remedy, for if he brings an action on the bail-bond against the defendant or his bail, they may plead *comperuit ad diem*, and so defeat the action. *Spicer v. Linnell*, East, 23 Geo. 3. C. P. Imp. K. B. 159. [d]

The sheriff being thus called upon to bring in the body, must either bring it into court, or put in and perfect bail, above, within the time allowed him by the rule. 1 Wils. 262. *Wolfe v. Collingwood*. If he do not, it is now considered as a contempt, for which the court will, on an affidavit of the service of the rule [e], and that no bail has been put in, or that bail has been put in,

but not perfected, grant an attachment; though formerly we have seen the practice was to *amerce* the sheriff: see ante, note (2). The sheriff has the whole of the day, on which the rule to bring in the body expires, to bring it in; therefore the contempt is not incurred till that day be past, and of course an attachment cannot be moved for until the next day. [f]

If the sheriff is called upon in due time after he goes out of office *to return the writ*, and neglects to do so, he is liable, by the practice of both courts, to an attachment. So he always was in C. B. if he neglected *to bring in the body* after being served with a rule for that purpose; however in K. B. the practice till lately was to proceed against him *by distringas* for not bringing in the body. But now by rule of that court, Trin. 31 Geo. 3., where any sheriff before his going out of office shall arrest any defendant, and *cepi corpus* shall be returned, he shall and may, within the time allowed by law, be called upon *to bring in the body* by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted. 4 Term Rep. 379. [g] The sheriff

[b] 2 East, 241. *The King v. Sheriffs of London*. S. P.; but if the time for putting in bail has expired, the rule to bring in the body may be taken on the day of the return of *cepi corpus*. 4 M. & S. 427. *The King v. Sheriff of Middlesex*.

[c] 8 East, 525. *The King v. Sheriff of Middlesex*, S. P.

[d] But the taking out the rule ought not to be unnecessarily delayed, therefore, where the sheriff returned *cepi corpus* in Hilary term, and the plaintiff did not rule him to bring in the body until Michaelmas term, the court of K. B. set aside an attachment against him for not doing it. 7. T. R. 452. *The*

King v. Sheriff of Surrey. See also 3 Bos. & Pull. 151. *The King v. Per-ring*; and 9 East, 467. *The King v. Sheriff of Surrey*. 1 Taunt. 111. *The King v. Sheriffs of London*.

[e] 1 N. R. 121. *Barnard v. Berger*.

[f] *The King v. Sheriff of Essex*, cited in 7 T. R. 528. 8 T. R. 464. *The King v. Sheriff of Middlesex*. 1 Price, 338. *The King v. Sheriffs of London*.

[g] And if the old sheriff, after having arrested the defendant, suffers him to escape, and goes out of office before the return of the writ, he is answerable for the escape. 4 East, 604. *The King v. Late Sheriff of Middlesex*.

cannot be discharged from the attachment for not bringing the body, but upon payment of the whole debt and costs, and not merely of the sum sworn to, and costs. 7 Term Rep. 370. *Keppel v. King*. 1 H. Black. 233. *Fowlds v. Mackintosh*. [h] And he must then have recourse against the bail by putting the bail bond in suit, against them; though in general he is reimbursed by his officer, who brings the action in the sheriff's name. If the sheriff be in contempt for not bringing in the body, and then the defendant dies, an attachment may issue against him afterwards for the prior contempt, though the original cause abated by the defendant's death. 3 Term Rep. 133. *The King v. Sheriff of Middlesex*.

The attachment is often set aside by the favour of the court upon terms,

in order to let in a trial of the merits; those terms vary with the circumstances; if the plaintiff has not lost a trial, the court will set aside the proceedings upon putting in and perfecting bail above, and payment of costs. 4 Term Rep. 352. *Hill v. Bolt*. But if a trial has been lost, the court will further require that the attachment shall remain in the office, and stand as a security for the sum recovered. [i] If the application be made on behalf of the defendant, it is necessary that there should be an affidavit of the merits; or if made by the sheriff, though it cannot be expected that he should swear to merits, the court will require an affidavit that the application originated from him, and was not made in collusion with the defendant in the cause. 7 Term Rep. 239. *The King v. Sheriff of Surrey*. [j]

[h] And the law is the same since the stat. 43 Geo. 3. c. 46. s. 2. (which obliges the sheriff to take the sum indorsed on the writ, and 10*l.* for costs in lieu of bail,) in case the sheriff omit to take that sum on the arrest. 9 East, 316. *The King v. Sheriffs of London*. But he is not liable beyond the penalty of the bail bond, if taken. 4 East, 604. *The King v. Sheriff of Middlesex*. Tidd, 337. Nor where the attachment against the sheriff is in an action against the acceptor of a bill of exchange, is he liable to pay the costs in other actions against other parties to the bill. 2 B. & A. 192. *The King v. Sheriffs of London*. Although the acceptor himself could not have staid the proceedings except upon payment of those costs, in which respect he differs from other parties to the bill, who may stay proceedings on payment of the debt and their own costs respectively. 4 T. R. 691. *Smith v. Woodcock*. *Same v. Dudley*.

[i] By "a trial has been lost," is meant such a trial as would enable the

plaintiff to have judgment of the term in which the writ is returnable. See further, 1 Chitty's Rep. 180. *Lee v. Cary*. Ibid. 237. *The King v. Sheriff of Middlesex*. Ibid. 270. *Phillips v. Whitehead*. Ibid. 357. *The King v. Sheriffs of London*, and the notes to each of those cases. And that it is incumbent on the plaintiff to show that a trial has been lost. See 5 Taunt. 606. *The King v. Sheriff of Surrey*.

[j] Acc. 3 M. & S. 299. *The King v. Sheriff of Middlesex*. And to the same effect by rule of the court of K. B. M. T. 59 Geo. 3. 2 B. & A. 240. 1 Chitty's R. 348. note (a), it is ordered "that from and after the last day of "this present term, no rule shall be "drawn up for setting aside an attachment regularly obtained against a "sheriff for not bringing in the body, "or for staying proceedings regularly "commenced on the assignment of any "bail bond, unless the application for "such rule shall (if made on the part "of the original defendant) be ground-

But the court will not relieve him, either by setting aside the attachment, or by staying proceedings in an action for an escape, if he has been guilty of a breach of duty, in discharging the defendant out of custody, without the plaintiff's consent, upon his own undertaking to appear and put in bail, instead of taking a bail bond. 7 Term Rep. 239. & 109. *Fuller v. Prest.* [k]

(8) S. P. F. N. B. 565. B. 7th edit. But, it seems, he might have taken bail of his own accord. Gilb. H. C. P. 20, 21. 3d edit. 1 Vent. 55. *Anon.* Ibid. 85. *Parker v. Welby.* This arbitrary power produced, as might naturally be expected, great extortion and oppression of the subject. 2 Mod. 180. *Ellis v. Yarborough.* Therefore the statute was made to compel sheriffs in future to take bail in those cases where they might have taken bail, and neglected or refused to do so. 4 Term Rep. 508. *Bengough v. Rossiter.* For the nature of the writ of *homine replegiando*, see 2 Lill. P. R. 23. 1 Atk.

633. *Treblecock's case.* 3 Black. Comm. 129.

(9) So where it was stated that A. demised to B. who entered, and was possessed, the reversion thereof belonging to the said A. this was held to be a sufficient averment that A. had the reversion. 1 Salk. 13. *Hicks v. Downling.* So where in trespass for his horse, the defendant pleaded, that P. was owner of the horse which strayed out of his possession, and came to the hands of the plaintiff, and the defendant, by the command of P. demanded the horse within the year, *proferendo satisfactionem*, it was held, that this is a direct affirmation that he tendered amends, like the case of *warrantizando vendidit*, where the participle affirms as directly as the verb; so *dans plagam mortalem* is well enough. 5 Rep. 120. *Long's case.* 2 Salk. 686. *Henly v. Walsh.* So any words which imply such a matter to be so, are sufficient; as if it be pleaded that A. was seised in fee, and died, and the land descended to B. as his son and heir, this

"ed upon an affidavit of merits, or
 "(if made on the part of the sheriff
 "bail, or officer of the sheriff,) be
 "grounded upon an affidavit, shewing
 "that such application is really and truly
 "made on the part of the sheriff or
 "bail, or officer of the sheriff, (as
 "the case may be) at his or their own
 "expence, and for his or their only in-
 "demnity, and without collusion with
 "the original defendant." If an affi-
 "davit of merits be made, it is not neces-
 "sary to state on whose behalf the appli-
 "cation is made. 1 Chitty's R. 572. *Bell*
v. Taylor. The affidavit of merits must
 be made by the defendant himself. 1
 Chitty's R. 722. *The King v. Sher-*
riff of Middlesex. If the application
 be made on behalf of the sheriff, or the
 bail, the affidavit must strictly comply
 with the rule. 1 Chitty's R. 347. *The*

King v. Sheriff of Middlesex. See also
 2 B. & A. 190. *The King v. Sheriff of*
Middlesex.

[k] 6 Taunt. 554. *Birn v. Bond.*
 S. P. 2 Marsh. 261. S. C. And in such
 case the sheriff, although he pay the
 debt, cannot recover against the de-
 fendant; 8 East, 171. *Pitcher v. Bai-*
ley; therefore the court will not in such
 case set aside the attachment, on the
 application of the defendant, even upon
 an affidavit of merits; 2 B. & A. 354.
The King v. Sheriffs of London;
 1 Chitty's R. 68. S. C.; but where it
 was sworn that the omission to take a
 bail bond was a mere mistake, the
 court let the defendant in to try the
 action, ordering the attachment to
 stand as a security. 1 Chitty's R. 721.
Turnbull v. Moreton.

was held to be a sufficient averment that he died seised, though it be not said in express words *that he died so thereof* scend to B. as his heir. 2 Lutw. 1172. *Hill v. Bolton*. See 1 Saund. 117. *Cutler v. Southern*, note (4).
seised; for otherwise it could not de-

Case 9.

Hodsden *against* Harridge.

Michaelmas, 22d of King Charles the 2d. Roll. 554.

London, } **B**E it remembered, that heretofore, to wit, in
to wit. } Easter term last past, before our lord the
king at *Westminster*, came *Jasper Hodsden*, by *Charles Ballet*
his attorney, and brought here into the court of our lord
the king then there, his certain bill against *Rowland Harridge*,
in the custody of the marshal, &c. of a plea of debt, and
there are pledges of prosecution, to wit, *John Doe* and
Richard Roe, which said bill follows in these words, that is
to say: *London*, to wit, *Jasper Hodsden* complains of *Rowland*
Harridge, being in the custody of the marshal of the mar-
shalshea of our lord the king, before the king himself, of a
plea, that he render to him 15*l.* of lawful money of *Eng-*
land, which he owes to and unjustly detains from him, for
this, to wit, that whereas divers disputes and controversies
were had and moved between the said *Jasper* aud the said
Rowland, touching and concerning certain sums of money
due from the said *Rowland* to the said *Jasper*, for malt (1)
before that time sold and delivered by the said *Jasper* to the
said *Rowland*. And whereas also for the quieting of the said
dispute and controversies, *as well the said Jasper as the said*
Rowland, on the 24th day of *October*, in the 13th year of the
reign of our lord *Charles* the 2d, now king of *England*, &c.
at *London* aforesaid, to wit, in the parish of *St. Dunstan* in the
east, in the ward of *Farringdon* without, *London*, submitted and
put themselves (2) to and upon the award, order, determination,

Debt on an
award;

disputes between
plaintiff and de-
fendant about
some malt,
who mutually
submitted them-
selves to the
award of T. W.
and R. L.

(1) It is held necessary, in debt on an award, to state in the declaration for what cause the parties submitted to arbitration; but where an award is pleaded in bar, it is sufficient to aver that they submitted themselves to arbitration generally. 5 Edw. 4. 1 pl. 5. Bro. Arbitrement. 34. However, it is omitted

in the declaration in *Coppin v. Hurnard*, post, 127. and it seems to be optional either to state or omit it.

(2) In debt or assumpsit upon an award, it is necessary to state in the declaration a mutual submission, as is done in this entry, and in other precedents. Post, 127. *Coppin v. Hurnard*.

and judgment of *Thomas Whitehill* innkeeper, and *Richard Lilly* citizen and stationer of *London* arbitrators indifferently chosen, as well on the part of the said *Jasper*, as on the part of the said *Rowland*, to arbitrate, order, determine, and adjudge of and

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1 Saund. 32. *Birks v. Trippet*. Rast. 153. b. Co. Ent. 159. a. Lib. Plac. 107. pl. 3. 116. pl. 18. Brownl. Rediv. 181. Hans. Ent. 89. 91. Reg. 111. a.; an award being the determination of a third person between others who submit to his judgment, and the submission creating a mutual obligation upon them to acquiesce in his decision. Therefore where in debt on an award, the plaintiff declared that the defendant by bond submitted himself to the award of J. P. an arbitrator indifferently named and elected, as well on the part of the plaintiff, as of the defendant, and that J. P. awarded the defendant to pay so much, &c. it was held on demurrer that the declaration was insufficient for want of shewing a mutual submission: for the words, "on the part" of the defendant, do not import the arbitrator to be named by the defendant [a]; that there is a difference where the action is brought upon the bond of submission, and where upon the award itself; in the former case the defendant by praying oyer shews there were mutual submissions, the condition always reciting it, but in the latter it must be averred, before the award can be properly introduced. 2 Str. 923. *Dilley v. Polhill*.

In general it is enough to allege that the plaintiff and defendant submitted themselves to the award of J. J. without setting out the submission, or saying that it was in writing; but where the parties are bound by their submission in a different manner from what

they would in general be subject to, it is necessary to state the terms of the submission in order to shew their liability in that particular case. As where in assumpsit against A. and B. the declaration stated that on the 23d March 1792, and for three years before, A. rented a farm called L., and B. rented it for the two following years, and quitted on the 25th of March 1794, and afterwards the plaintiff rented it; this dispute had arisen between the defendants and plaintiff respecting the state of the fences at the respective times when the defendants severally quitted the farm, and that doubts had arisen whether the defendant A. left the same in proper repair, and also whether the defendant B. left the same in repair, and that by an agreement in writing between the defendant A. on the first part, the defendant B. of the second part, and the plaintiff of the third part, the said parties jointly and severally agreed to refer all matters in dispute between them to the determination of J. S. and the defendants thereby jointly and severally undertook and agreed with the plaintiff to keep the award of J. S. and the plaintiff undertook to and with the defendants jointly and severally to perform the award on his part. The declaration then stated that J. S. made his award and directed the defendant A. to pay so much money, and the defendant B. to pay so much to the plaintiff, but that they refused, &c. It was objected in arrest of judgment,

[a] These words are taken from the report of the judgment; but it appears clearly that the fault in the declaration

was in omitting to aver that the plaintiff submitted, for the defendant's submission was expressly averred.

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so as they make their award in writing under their hands and seals, ready to be delivered on or before the 7th of November then next; and if they should not agree, then to the umpirage of such person as the said arbitrators should choose,

* [62]
so as the umpirage should be put in writing under his hand and seal before the 20th day of November. The arbitrators did not agree,

concerning all actions, suits, quarrels, controversies, accounts, trespasses, disputes, claims and demands whatsoever, then depending and being between the said parties from the beginning of the world, until the said 24th day of *October* in the year aforesaid, so as the said arbitrators should make and publish their award touching the premises, in writing under their hands and seals, ready to be delivered to the said *Jasper*, and the said *Rowland*, on or before the 7th day of *November* then next following; and if the said arbitrators should not agree in * their said award at and by the time aforesaid, then as well the said *Rowland* as the said *Jasper* on the 24th day of *October*, in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, put themselves to and upon the award and umpirage of such person as the arbitrators should name and choose to end and determine the premises, so as the umpirage and award of such umpire should be put in writing under his hand and seal, before the 20th day of the said month of *November*. And whereas also the said arbitrators at any time after the said 24th day of *October* in the year aforesaid, or on or before the said 7th day of *November* then next following, did not agree, make or publish any award touching the said premises in writing under their hands and seals, ready to be delivered to the said *Jasper* and *Rowland*, according to the said submission; but the said arbitrators afterwards, to wit, on the 7th day of *November* in the year aforesaid; at *London* aforesaid, in the parish and

that this was not a joint, but a several, promise of each defendant to be answerable for himself only; for their interests in the subject matter of the promise were several and not joint; beside, the arbitrators award nothing to be done by the defendants jointly, but that each should pay a certain sum; and 5 Rep. 18 b. *Slingsby's* case was cited, in which it was adjudged, that where it appears by the declaration that every of the covenantees has a several interest or estate, the covenant made with them, and every of them, is several in respect of their

several interests. But the court was of opinion that the words of the agreement were too strong to be got over, and tho' it was reasonable that each should only make satisfaction for the time he occupied, and which would have been the case if the submission had been general, yet by the terms of the submission or agreement they have promised jointly and severally, which makes them responsible the one for the other; and the objection was over-ruled. 7 Term. Rep. 352. *Mansell v. Burreddge*. [b]

[b] As to what covenants and agreements are joint, and what several, see ante, vol. i. 154. notes, and as to the

pleadings on them, ante, vol. i. 291 b. notes.

ward aforesaid, did name and choose one *Richard Weeks* of the parish of *St. Giles* without *Cripplegate* in the county of *Middlesex*, brewer, umpire, to end and determine the premises aforesaid: which said *Richard Weeks* afterwards and before the said 20th day of *November* in the year aforesaid, to wit, on the 19th day of *November* in the year aforesaid, at *London* aforesaid, in the parish and ward aforesaid, having taken upon himself the burden of the said umpirage and award, made his certain umpirage of and upon the premises (3) under the hand and seal of him the said *Richard Weeks*, and by the said umpirage awarded and ordained that

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but choose R.
W. to be umpire,

(3) An award or umpirage ought in pleading to be stated to have been made pursuant to the submission, in form as well as substance; therefore regularly this declaration should have averred that R. W. made his umpirage *in writing* under his hand and seal according to the submission; but as the umpirage is expressed to be *under his hand and seal*, it must necessarily be intended to be in writing; and so it was adjudged in *Fuller v. Lane*, cited by *Dolben J.* in *Reusby v. Manning*. Carth. 159. and reported in 2 Sid. 38. by the name of *Lane v. Butler*, where the submission was, "so that the award be made in writing under the hands and seals ready to be delivered to the parties, &c.;" and it was pleaded that the arbitrators did make an award under their hands and seals, and ready to be delivered to the parties, and an exception was taken, that it was not expressly averred that the award was made *in writing*, as the submission required: but it was not allowed, because it must necessarily be intended it was in writing, it being pleaded to be under the hands

and seals of the arbitrators; but *Hale*, who was then (1657) chief justice of C. B. doubted.

But where the submission is that the award should be in writing under his hand and seal, it is not sufficient to aver that it was *in writing* merely without more: As where in debt upon bond conditioned to perform the award of J. S. so as it be made in writing under his hand and seal by such a day ready to be delivered to the parties; the defendant pleads no award made; the plaintiff replies that the arbitrator before the day made his award *in writing* which is set out, and a breach assigned; and on a general demurrer it was objected that it did not appear to be *under the hand and seal* of the arbitrator, as the submission required: and for this fault the court held the replication ill. 1 Str. 116. *Henderson v. Williamson*. See also 1 Bulst. 110. *Scott v. Scott*. 1 Roll. Abr. 245. pl. 25. Palm. 109. 112. *Thayer v. Thayer*. Ibid. 121. *Gardenfield v. Lane*. Cro. Jac. 278. *Sallows v. Girling*. 2 Mod. 77. *Columbel v. Columbel*. [c]

[c] Where the submission was "so that the arbitrators made their award *in writing under their hands*," it was held insufficient to aver "that the arbitrators *duly* made their award *in writ-*

ing," and judgment was reversed for want of the words "*under their hands*." 6 Taunt. 645. *Everard v. Paterson*. 2. Marsh. 304. S. C.

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who awarded that the defendant should pay the plaintiff 15*l.* within 14 days, but the defendant refuses to pay.

the said *Rowland Harridge* should pay, or cause to be paid to the said *Jasper Hodsden* the sum of 15*l.* of lawful money of *England*, within 14 days then next following, in full satisfaction of all debts, accounts and sums of money due to the said *Jasper* (4); whereby an action has accrued to the said *Jasper* to demand and have of and from the said *Rowland* the said 15*l.* Yet the said *Rowland* (although often required has not yet paid to the said *Jasper* the said 15*l.* but to pay the same to him has hitherto altogether refused and still refuses, to the damage of the said *Jasper* of 20*l.* and therefore he brings suit (5), &c.

(4) It is now usual in practice to aver in the declaration in debt upon an award, and also in the replication in debt on bond conditioned for performance of an award, that the defendant *had notice* of the award; but such an averment has been held not to be necessary, because the defendant may take notice of the award as well as the plaintiff. 1 H. 7. 5. Bro. Condition, 124. Bro. Notice, 18. 8 Rep. 92. b. *Fraunces's* case. Cro. Car. 132. *Juxton v. Thornhill*. 2 Bulst. 143. *Child v. Horden*. *Collet v. Bayfield*, cited Hard. 42. For it is a general rule, that when a matter does not lie more properly in the knowledge of one of the parties than the other, notice is not requisite; therefore if a man is bound by obligation, or covenants, or promises, to do a thing on the performance of an act *by a stranger*, notice need not be

alleged, for it lies in the defendant's knowledge as much as the plaintiff's, and he ought to take notice at his peril. 1 Buls. 44. *Gable v. Moss*. 1 Roll. Abr. 462. pl. 3. 4 Freem. 254. *Clerke v. Child*. [d] If however it be provided that the award should be notified to the parties, it is no award until notice be given. 2 Buls. 144. *Child v. Horden*. [e]

(5) An action of *debt* lies on an award for a sum of money awarded, upon a submission either by rule of court or by deed or in writing without deed, or by parol; but where an award is for performance of a collateral act where the submission was without deed, it was formerly holden, that there was no remedy to enforce it; but however the law is now taken to be, that the party may have *assumpsit* to compel performance. 2 Ld. Raym. 1040. *Purslow v. Baily*. [f] An award,

[d] See ante, vol. i. 117. note (2), also 5 T. R. 621 & 624. *The King v. Holland*. Cro. Jac. 432. *Henoring's* case. So notice of non-payment by the acceptor must be given by the holder of a bill of exchange to the other parties whom he means to sue, it being a matter particularly within his knowledge. Dougl. 679. *Rushton v. Aspinall*.

[e] But in order to proceed by *attachment*, personal notice of the award

is necessary, as the object is to bring the party into contempt. 1 Bos. & Pull. 394. *Brandon v. Brandon*. 5 Taunt. 813. *Brander v. Penleaze*. 1 Chitty's Rep. 229. *Hartley v. Barlow*. n. a. However it has been lately held, that personal knowledge of the award and rule of court brought home to the party is equivalent to a personal service. 1 Barn. & Cress. 264. *In re Bower*.

[f] So *assumpsit* will lie upon a submission by rule of nisi prius. 5 East,

And now at this day, to wit, on *Friday* next after three weeks of *St. Michael*, in the same term, until which day the said *Rowland Harridge* had leave to imparl to the said bill and then to answer, &c. before our lord the king at *West-*

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though indented under the hand and seal of the arbitrator, is no deed or specialty, but a writing under hand and seal. *Sty. 459. Dod v. Herbert.* 1 Burr. 281. *Perry v. Nicholson*, per *Denison J.* [g]; therefore it is not necessary to make a profert of it. *Sty. 459.* 1 Salk. 73. *Foreland v. Marygold.* In debt on an award, it is enough to shew so much only of the award as is sufficient to maintain the action; therefore if the plaintiff declares that it was (among other things) awarded, it is good. Lit.

Rep. 312. *Leake v. Butler*, though *Twysden J.* is supposed to hold the contrary in a subsequent case which is very loosely reported. 1 Mod. 36. *Leach v. Morris.* So where in debt upon an award, by which it was awarded that the defendant should pay the plaintiff 10*l.* in full satisfaction, it was objected that the declaration was not good, because it did not appear that any thing was awarded to the defendant; but the court was clearly of opinion, that the plaintiff is not bound to shew in his

139. *Bonner v. Charlton.* So on a submission by a judge's order. 4 Campb. 19. *Still v. Halford.* "The defendant," it is said, "may insist at the trial, upon the general issue of *non assumpsit*, on any legal objection to the validity of the award which is apparent on the award itself; and if courts of law have not any jurisdiction over the award, so that there is no power to make an application for setting it aside; the defendant may shew some irregularity by matter extrinsic, such as want of notice of the meeting, or collusion in the arbitrator; but if a court of law has such jurisdiction (as where the reference is by rule of court, or order of nisi prius, or where the submission is by writing, and the parties agree to make it a rule of court, under the authority of st. 9 & 10 W. 3. c. 15.), he cannot in such cases impeach the award by proof of any extrinsic matter, which would be a ground for an application to set aside the award, and which ought to be brought forward in that specific form within a

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"certain limited time." 1 Phil. Ev. 112. It is in general better to proceed by action of *debt on the award*, where it can be done, than by debt on the bond, or by *assumpsit* or covenant, as the case may be; because if judgment be given by default in debt on the award, it is final in the first instance; but in debt on bond for non-performance of an award, breaches must be suggested under 8 & 9 W. 3. c. 11. s. 8. 6 East, 613. *Welch v. Ireland*; and in *assumpsit* or covenant the judgment by default is interlocutory. See further as to awards, post, 133 a. et seq.

[g] But it seems that if the award be under hand and seal and delivered by the arbitrator as a deed, it is a deed. 4 East, 584. *Brown v. Vawser.* But if not so delivered, it is no deed, although under seal; for delivery is essential to a deed, but the award is complete and perfect when signed and sealed and ready to be delivered, before it be actually delivered. *Ibid.*, and see 17 Ves. 232. *Blundell v. Bret-targh.*

HODSDEN v. minster, comes as well the said *Jasper* by his said attorney, **HARRIDGE.** as the said *Rowland* by *John Hardisty* his attorney; and the said *Rowland* defends the wrong and injury when, &c. and says that the said *Jasper Hodsden* ought not to have or maintain his said action thereof against him, because he says, that the said bill of the said *Jasper* was exhibited on the 8th day of *April*, in the 20th year of the reign of our lord the now king, and not before, and that the cause of action, upon which the said *Jasper* has above declared against the said *Rowland* has not accrued within six (6) years next before

[63]

*Causa actionis
non accrevit
infra sex annos.*

declaration all the award, but only so much of it as does intitle him to the thing, &c. and if the defendant will impeach the award, it must come on his side. 1 Leon. 72. *Smith and Kirfoot's case*. So in 1 Sid. 161. *Tilford v. French*, it was said, and agreed to by *Twysden J.* that if debt be brought upon an award for money generally, without shewing the award on both sides, the action is maintainable. And in 1 Salk. 72. *Foreland v. Marygold*, it was agreed that, in debt on an award, the plaintiff need not set forth any more of the award than makes for him. 12 Mod. 534. 1 Ld. Raym. 715. S. C. So in 1 Burr. 280. *Perry v. Nicholson*, it is said that nothing is clearer than that in an action of debt upon an award, a man has no need to state in his declaration any more of the award, than supports his case; if there be any thing by way of condition precedent to the payment of the money, the defendant may set it out in pleading.

But in debt upon bond to perform an award, it seems necessary to set forth the whole award in the replication; 1 Salk. 72. *Foreland v. Marygold*; which distinction is recognised by *Denison J.* in the above cited case of *Perry v. Nicholson*, 1 Burr. 281. But though the plaintiff in debt on an award is not bound to shew the whole award, yet if he does set forth the whole, and it appears to be a defective award, the de-

claration is bad; Lit. Rep. 313. *Leake v. Butler*; as if he shews an award of money on one part and a release on the other part, when the submission was by parol, and therefore no remedy for the release, as the law then stood. 1 Sid. 160. *Tilford v. French*. S. C. 1 Lev. 113.

(6) By statute 21 Jac. 1. c. 16. s. 3. it is enacted, "That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, trover, and replevin, for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them shall be commenced and sued within the time and limitation hereafter expressed, that is to say, the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods and cattle, and the said action of trespass *quare clausum fregit*, within six years next after the cause of such actions or suits, and not after; and the said actions of trespass of assault, battery,

the exhibiting of the said bill. And this he is ready to verify; wherefore he prays judgment, if the said *Jasper* ought to have or maintain his said action thereof against him, &c. HODSDEN v. HARRIDGE.

"wounding, imprisonment, or any of them, within four years next, [*h*] after the cause of such actions or suits, and not after, and the said actions upon the case for words within two years next after the words spoken and not after." And by section 4. it is enacted, "That if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that, in all such cases, the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after."

It is now settled, that if the defendant would take advantage of this statute, it is necessary for him to plead it, although the cause of action appears on the declaration to have accrued upwards of six years before, and he will not be permitted to give it in evidence on the general issue. 1 Vent. 191. *Puckle v. Moor*. 1 Lev. 110. *Lee v. Rogers*. 2 Ld. Raym. 838. *Gould v. Johnson*. This however seems to be an exception

to the general rule. In all other cases except such as are founded upon this statute, and the 32 H. 8. c. 2. of limitations, (8 Rep. 64 b. *Foster's* case) where an action is required by statute to be commenced within a limited time, it is the duty of the plaintiff to prove that he has complied with the terms of it; and if he do not, he will fail in his suit. The statute 31 Eliz. c. 5. s. 5. which limits actions upon penal statutes to two years after the commission of the offence, where the forfeiture is given to the king only, and to one year, where it is to the king and any other person, is conceived in terms almost similar to the present: but it seems clear, that the defendant may take advantage of that statute on the general issue, and need not plead it; the constant practice at nisi prius being, for the defendant to call upon the plaintiff to prove the commencement of his action within the limited period, and many questions arise as to what shall be said to be a proper commencement of it. And indeed at first, it was considered not to be necessary for the defendant to plead this statute; for in *Trinity* term, 4 Car. 1. which was soon after the making of the act, a motion was made in arrest of judgment in *assumpsit*, that the promise was alleged in the declaration to be made beyond the time limited in the statute, and all the court held that if it appear by the plaintiff's own shewing, that the action is not brought within the time limited

[*h*] However in actions of assault, if the defendant plead not guilty within six years, the plea is good, unless spe-

cially demurred to on that account; for the greater term includes the less. 6 East, 387. *Macfadzen v. Olivant*.

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Demurrer.

And the said *Jasper Hodsden* says, that he, by any thing by the said *Rowland* above in pleading alleged, ought not to be barred from having his said action thereof against the said *Rowland*, because he says, that the plea aforesaid, by him the

by the statute, he cannot maintain his action; or if the contract in *assumpsit*, or debt, be alleged to be within time, but, on *non assumpsit* or *nil debet* pleaded, it appears in evidence that the contract was beyond the limited time, the action lies not, and the defendant shall take advantage thereof if it be specially found by the jury; for the statute is in the negative, "that he shall not maintain such action but within the time limited by the statute;" Cro. Car. 115. *Brown v. Hancock*; and in the cases of *Freeman v. Stacy*, and *Sheroin v. Cartwright*. Hutt. 109. the general issue only was pleaded, and the jury found specially that the actions were brought six years after the causes of action accrued, and the court decided the cases upon the special verdicts. But the same objection having been made in a subsequent case, the court was equally divided upon it, *Jones* and *Whitlock* justices being of opinion, that, as the statute has many exceptions, the defendant ought either to plead it, or demur, and *Hyde* chief justice, and *Croke* justice conceiving, that, as it appeared in the declaration, that the contract was beyond the time of limitation, and the statute is in the negative, "that it shall not be brought," the defendant might take advantage of the statute without pleading. Cro. Car. 163. *Trankersley v. Robinson*. And the objection being again taken about five years after in arrest of judgment it was adjudged by *Jones* and *Berkley*, the only judges in court, that the defendant must plead the statute; and the reason assigned was because the plaintiff might be within the exceptions in the statute,

and the action thereof well brought, although the cause of action appeared on the face of the declaration to have accrued out of the limited time. Cro. Car. 381. *Stile v. Finch*. The same point was afterwards adjudged by the same two judges against the opinion of *Croke*, with this additional reason, that a latitat might have been sued out within time, and continued down to the writ with which the defendant was served; Cro. Car. 404. *Hawkins v. Billhead*; and at length it was fully settled that no advantage can be taken of the statute unless it be pleaded. See 1 Saund. 283. note (2).

These reasons seem to explain very sufficiently the ground of not arresting the judgment, on account of the action appearing on the face of the declaration to be out of time; but still one is at a loss to conceive why the defendant may not take advantage of the statute in evidence on the general issue, and compel the plaintiff to prove, either that he brought his action within the time limited, or that he was within some one of the exceptions, and therefore could not bring it before. The reason given in 1 Levinz. 110. *Lee v. Rogers*, "that the statute was made for the ease of those who will take advantage of it, and the court will not give a defendant the advantage of it unless he pleads it," though true as a proposition of law does not appear to be satisfactory. Perhaps the true ground of distinction, between the statute of limitations, and the statute 31 Eliz. and other statutes limiting penal actions to a definite period, may be this; the former statute limits those actions, where a

said *Rowland*, in manner and form aforesaid above pleaded, and the matter in the same contained, are not sufficient in law to bar the said *Jasper* from having his said action thereof against him the said *Rowland*; to which he the

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debt or other cause of action, is already vested in the plaintiff by means of some contract, or other transaction, between the plaintiff and defendant, prior to the bringing of the action; but in penal actions, the duty or right of action attaches in the plaintiff merely by bringing the action, and did not exist in him before; and unless he brings his action within the time prescribed, there is no right of action attached in him; therefore he seems as much bound to prove the commencement of his action within time, which is the cause or consideration of it, in order to intitle himself to a verdict, as a person who brings *assumpsit* or debt, for goods sold and delivered, or money lent, and the like, is to shew the cause or consideration of his action, to intitle him to a verdict; and if he fail therein, it appears that he has no cause of action; but the statute of limitations admits the cause or consideration of the action still existing, and merely discharges the defendant from the remedy, so that a promise within six years without any other consideration is sufficient to revive the action; therefore if he will take advantage of that circumstance, it is necessary he should plead

the statute. 5 Burr. 2630. *Quantock v. England*. 3 Term Rep. 11. per *Buller* justice, in *Petrie v. White*. [i]

The plea of *non assumpsit infra sex annos* is insufficient in many cases; for if the cause of action accrued within six years, it is immaterial when the promise was made. 2 Salk. 422. *Gould v. Johnson*. S. C. 2 Ld. Raym. 838. because the statute operates as a bar only from the time the cause of action arose, and not from the time of making the promise: the words of the statute being, "within six years next after the cause of such actions or suits," and not after. As if a promissory note were made seven years ago to pay money within three years after, the statute is no bar; so if it were made seven years ago to pay money within three months after, though the statute would be a bar, yet the defendant must not plead *non assumpsit infra sex annos*, for that would be bad; but the plea must be *causa actionis non accrevit infra sex annos*; 1 Vent. 191. *Puckle v. Moor*; and see 1 Saund. 33. *Birks v. Trippet*, note (2). [k] Indeed if *indebitatus assumpsit* be brought on a promise to pay on demand, the plea of *non assumpsit infra sex annos* has been held to

[i] The reason here given by the learned serjeant for the above distinction seems to be fortified by the practice in actions of ejectment, where the plaintiff is bound to give evidence of title to the possession within twenty years under the 1st. section of this same statute 21 Jac. 1. c. 16. although the general issue only be pleaded; for in ejectment an entry is necessary to vest in the plaintiff a right of action, which entry is

proved by bringing the action and the consent rule thereupon entered into.

[k] But to an action on a promissory note payable on demand, *non assumpsit infra sex annos* is a good plea, for it is payable immediately on the making of the promise. *Christie v. Fonsick*, MS. 1 Selwyn's Ni. Pri. 135. Where the note is payable after sight the statute runs only from the time of presentment. 2 Taunt. 323. *Holmes v. Kerrison*.

HODSDEN v. said *Jasper* has no necessity, nor is he bound by the law of HARRIDGE. the land, in any wise to answer. And this he is ready to verify; wherefore for want of a sufficient answer in this behalf, he the said *Jasper* prays judgment and his debt afore.

be good, because it shews a debt due at the time of the promise; but if the promise were to do a collateral thing, which would create no debt till demand, it would be otherwise. Bull. nisi prius, 151. However though the statute should take place from the time of making the promise, as in the case before cited, or for goods sold and delivered, money lent or the like, yet the plea of *actio non accrevit infra sex annos* is proper; therefore it seems to be the safest and best way of pleading the statute, in all cases of debt on simple contract, or *assumpsit*, to say, that "the said several causes of action in the said declaration mentioned, or any, or either of them, did not accrue to the said (plaintiff) within six years next before the suing forth of the original writ (or exhibiting of the bill) of the said (plaintiff), &c." [7] When the plea of the statute of limitations was first pleaded, the way was to plead the statute at large. 2 Mod. Ent. 142. Lib. Plac. 61.

If an assignee of a bankrupt declare that the defendant was indebted to the bankrupt, and promised *plaintiff* (the assignee) to pay, the defendant cannot plead that the cause of action did not

accrue to the bankrupt within six years, because the plea does not answer the promise in the declaration, and precludes the plaintiff from proving a promise to himself, therefore such a plea is bad on demurrer. 2 Str. 919. *Skinner v. Rebow*. So where, in an action brought by the assignees of an insolvent debtor, to recover money owing to him before his insolvency, the plaintiffs declare that, in consideration of the money being due to the insolvent, the defendant promised to pay it to them as assignees, a plea, "that the said several causes of action in the said declaration mentioned, and each and every of them first accrued to the said A. M. (the insolvent) before the plaintiffs became assignees, and that six years had elapsed after the time when the said several causes of action, and each, and every of them, first accrued to the said A. M. and before the day of suing out of the original writ of the plaintiffs," has been held to be bad; for it does not contain any answer to the declaration, which states a promise made to the plaintiffs. 2 H. Black. Rep. 561. *Kinder v. Paris*.

To the plea of the statute, the plaintiff

[7] And in actions on the case for torts this form of pleading the statute is the only correct one; for *not guilty within six years* is ambiguous, and may either mean within six years of the act done, or of the consequences of that act, which latter constitute the cause of action. 3 B. & A. 448. *Dyster v. Battye*. 16 East, 215. *Roberts v. Read*. But in *assumpsit* the breach of contract is the cause of action and not the con-

sequential damages; 3 B. & A. 288. *Battley v. Faulkner*; and the statute runs from the time of the breach; 3 B. & A. 626. *Short v. M'Carthy*; even where there is gross fraud on the part of the defendant; 2 Brod. & Bing. 73. *Brown v. Howard*. If the declaration had been framed in case it seems that the law would have been otherwise. Ibid.; and see Dougl. 654. *Bree v. Holbeck*.

said, together with his damages, on occasion of the detention of the said debt, to be adjudged to him, &c. HODSDEN v. HARRIDGE.

And the said *Rowland* says, that the plea aforesaid, by him Joinder.
the said *Rowland* in manner and form aforesaid above

may reply a *latitat*, or *capias*, sued out within time, and returned *non est inventus* by the sheriff, and shew that the process was regularly continued by *vicecomes non misit breve* to the time of declaring. 2 Salk. 420. *Budd v. Berkenhead*. 421. *Green v. Revitt*. If the *latitat* be returned, the continuance may be entered at any time. 6 Term Rep. 617. *Harris v. Woolford*. See ante, p. 1. *Mellor v. Walker*, note (1). It must be a continuance of the same writ or process which was originally sued out, and must appear on the record to be so; for the process must be taken out with intent to declare in that action, and be so stated, &c. Thus where the replication alleged that a bill of *Middlesex* was sued out against the defendant, which was continued down to a certain time, when that proceeding stopped, and then the plaintiff sued out an attachment of privilege; this was held not to be a continuance of the bill of *Middlesex*, or to have any connection with it; 3 Term. Rep. 662. *Smith v. Bower*: see the form of the replication, Lib. Plac. 151. pl. 82. Lill. Ent. 92. Ibid. 122.; but the last precedent is a bad one, for not stating that the first writ was returned. Willes's Rep. 255. *Karver v. James*. Although the first process is erroneous, as where an attachment of privilege is returnable on a common return day instead of a day certain, yet, as it is only voidable and not void, if it be returned by the sheriff, it is well enough to save the statute of limitations, and will support the continuance. 2 Black. Rep. 1131. *Leadbeater v. Markland*. Willes's Rep. 255. *Karver v. James*. So if the plaintiff reply an original *clausum fregit*, he must shew

that it was returned and continued down to the writ with which the defendant is served. 1 Lutw. 260. *Kinsey v. Hayward*. S. C. 1 Ld. Raym. 432. where the judgment of the common pleas to the contrary was reversed in the king's bench, and that judgment of reversal affirmed in parliament. S. P. 1 Lutw. 279, 280. *Brereton v. Moyses*. S. P. 3 Bos. & Pull. 330. *Stratton v. Savignac*. So, in *Brown v. Babington*, 2 Lord Raym. 883. Lord Holt said, it was a fatal fault that the plaintiff did not shew the original writ ever returned; if the plaintiff shews a writ and does not return it, this will not avoid the statute of limitations; to which the other judges agreed; and in *Atwood v. Burr*, 7 Mod. 5. Lord Holt said, "that in pleading the statute of limitations he always used to plead the return, and not the purchase of the writ, for it is the return that gives the court possession of the cause, and if one were to continue a *latitat* for several years, he must have the first writ returned, upon which return the continuances are made down, though in fact he never takes out another writ, but there must be a return of the first." S. P. 6 Term. Rep. 617. *Harris v. Woolford*. But it is said to have been adjudged in the common pleas, and afterwards in the king's bench on error, that if the plaintiff replies that he sued out an attachment of privilege, it is not necessary to shew that the writ was returned and continued, for it is in nature of an original, and if an original is replied to the plea of the statute, it is sufficient to shew the *teste* of it without any continuances; but if a *latitat* or *clausum*

HODSDEN v. HARRIDGE. pleaded, and the matter in the same contained are good and sufficient in law to bar the said *Jasper* from having his said action thereof against the said *Rowland*; which said plea, and the matter in the same contained, he the said *Rowland* is

fregit be replied, it must be shewn that it was continued properly to make it the foundation of the suit. 1 Wils. 167. *Finch v. Wilson*. However the authority of this case seems questionable; for in the case of *Budd v. Berkenhead*, 2 Salk. 420. S. C. Carth. 144. 1 Show. 366. it was held that an attachment of privilege must be returned and continued; and so is Willes's Rep. 255. *Karver v. James*; and 3 Bos. and Pull. 330. *Stratton v. Savignac*; and in the case of *Kinsey v. Hayward*, it was determined both in K. B. and in parliament, that an original must be returned and continued, and it does not appear from the report that either of these cases was cited. [m] If a *latitat* be in truth sued out after the expiration of the six years, as where it is sued out in the vacation, and of course bears *teste* the last day of the preceding term, and that was before the expiration of the limited time, and the plaintiff replies the *latitat* sued out on the day it bears date, the defendant may in his rejoinder shew the real day on which it was in fact sued out, and aver that he did not promise within 6 years before the last mentioned day. 2 Burr. 950. *Johnson v. Smith*. [n]

If an action is brought in an inferior court within six years, and, after some proceedings there, the time expires, and then the defendant removes the cause into the king's bench by *habeas corpus*, and the plaintiff declares there *de novo*, and the defendant pleads that the cause of action did not accrue within six years before the *teste* of the *habeas corpus*, the plaintiff may reply and shew the suit in the inferior court, and that will be sufficient to avoid the statute; and the reason is, not that the action in the king's bench is a continuance of the suit below, but, as the plaintiff had pursued his right within due time, it should not be in the defendant's power to defeat his right and take away his remedy without any fault in him. 2 Salk. 424. *Matthews v. Phillips*. 1 Sid. 228. *Bevin v. Chapman*.

If in *assumpsit* by an executor, in which all the promises are laid to be made to the testator in his life time, the defendant pleads that he did not promise within six years next before the obtaining of the original writ of the plaintiff, and the plaintiff replies that the original was sued on such a day, and within six years before the day of obtaining thereof, that is to say,

[m] See ante, vol. ii. p. 1 e. note [f]. It does not appear that there has ever been any decision as to the proper mode, or whether there be any mode, of keeping alive a bill filed for the purpose of saving the statute of limitations against an attorney, not practising and resident within ten miles of London, who either has not or cannot be served with a copy of the bill.

[n] So where in an action against an attorney the plaintiff takes issue on the plea of the statute and relies on the title of his bill, the defendant may shew by evidence that the bill was filed in the vacation the term of which it is entitled. Peake's Ni. Pri. Cases, 275. *Snell v. Phillips*.

ready to verify and prove, as the court, &c. and because the said *Jasper* does not answer the said plea, nor has hitherto in any wise denied the same, he the said *Rowland*, as before, prays judgment, and that the said *Jasper* may be barred

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on such a day, letters testamentary were granted to him, by which the plaintiff's action accrued to him within six years; this replication is bad, because the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will; for that gave no new cause of action, and therefore the time of proving the will is perfectly immaterial. Willes's Rep. 27. *Hickman v. Walker*. But where to an action by an administrator for money had and received to his use by the defendant, who had received the intestate's money *after his death*, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the plaintiff, the defendant pleaded the statute of limitations, and the plaintiff replied the special matter above mentioned; it was held upon demurrer that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death, and the plaintiff's title commenced by taking out letters of administration, before which time no cause of action accrued to him. 2 Salk. 421. *Cary v. Stephenson*. S. C. Carth. 355. Skin. 555. 4 Mod. 372. See *Stanford's* case cited Cro. Jac. 61. *Saffyd v. Adams*. [o] These special replications must conclude with an averment to give

the defendant an opportunity of answering the special matter. 4 Mod. 374. 376. *Curry v. Stephenson*. So where, in assumpsit by an executor on a contract made with his testator, all the promises in the declaration are laid to be made to *H. his testator*, and the defendant pleads the statute of limitations, the plaintiff cannot in his replication set forth a promise made to *himself* within six years, without being guilty of a departure, any more than he can in such case give evidence of a promise made to himself within six years upon an issue joined on the plea of the statute of limitations. Willes's Rep. 29. *Hickman v. Walker*. 1 Salk. 28. *Dean v. Crane*. S. C. 6 Mod. 309, 310. 2 Str. 890. Executors of the *Duke of Marlborough v. Widmore*. However in Carth. 471., *Heylin v. Hastings*, it is said to have been admitted that a promise made to an executor is sufficient to prove the issue of *assumpsit to the testator* within six years, because the promise does not give any new cause of action, but only revives the old cause, and is of no other use but to prevent the bar by the statute of limitations; but this seems not to be well founded; and it has since been determined, that evidence of an acknowledgment by the defendant within six years of an old existing debt, of above six years standing, due to the plaintiff's intestate, but which acknowledgment was made after the intestate's

[o] So where an action was brought by an administrator against the acceptors of bills of exchange payable to the intestate, and accepted after his death, but before the grant of letters of admi-

nistration, it was held that the statute ran only from the grant of the letters. 5 B. & A. 204. *Murray v. East India Company*.

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 HARRIDGE. *Rowland, &c.*

*Curia advisare
 vult.*

But because the court of our lord the king now here, is
 not yet advised what judgment to give of and upon the

death, will not support a count by the administrator, laying the promise to be made to his intestate. 3 East, 409. *Sarell v. Wine*. [p] So where to a declaration, in an action of assumpsit by the assignees of an insolvent debtor for money due to him before his insolvency, stating all the promises to have been made to the *plaintiffs*, the defendant pleaded that he did not *undertake and promise* in manner and form as the plaintiffs complained against him at any time within six years; he cannot rejoin, that the cause of action first accrued to the *insolvent* before the plaintiffs became assignees, and that six years had elapsed after the cause of action first accrued to the *insolvent*, for the rejoinder would be a plain departure from the plea. 2 H. Black. 562. *Kinder v. Paris*, note (a).

So the plaintiff may reply, on the fourth section of the statute, that heretofore he obtained a judgment, which was reversed, and that he now sues within a year after the reversal; or that he obtained a verdict and judgment which was arrested. Or the plaintiff may say in his replication, that he sued out an original upon which the defendant was outlawed, and the outlawry was afterwards avoided by plea, or reversed on error, and he sued within a year. Sir W. Jones, 312. *Lambe v. Finch*. S.C. Cro. Car. 294. 3 Lev. 245. *Whitwick v. Hovendon*. So where a person brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator

may within the equity of the fourth section bring a new action; 2 Salk. 425. *Matthews v. Philips*. 1 Lutw. 260. *Kensey v. Hayward*; provided he does it *recently* or within a reasonable time. No precise time is fixed as to what shall be deemed a reasonable time; but it should seem that the statute is the best guide upon the subject, and as that provides that a new action, in the cases enumerated in it, must be commenced *within a year*, so an executor ought also to bring a new action within that period. In 1 Ld. Raym. 434. *Kensey v. Hayward*, a year is said to be a reasonable time; and the court of king's bench appears to be of this opinion in *Wilcocks v. Huggins*, 2 Str. 907. Fitzg. 170. 289. where it is said, "that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed; and that they would not go a moment further, for it would let in all the inconveniences which the statute was made to avoid. Indeed if the executor had been retarded by suits about the will or administration, and had shewn that in pleading, it would have been otherwise, because the neglect would then have been accounted for." And in Fitzg. *Lee J.* said, "I think what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the court from the circumstances of the case; but generally the year in the statute is a good direction."

premises, a day thereof is given to the parties aforesaid, **HODSDEN v.**
 before our lord the king at *Westminster*, until *Saturday* next **HARRIDGE.**
 after the octave of *St. Hilary*, to hear their judgment of and
 upon the premises, for that the court of our said lord the

However, in *Lethbridge v. Chapman*, 15 Vin. 103. the action was allowed to be brought within 14 months after the testator's death, though no reason is assigned for it: Upon the whole therefore, it seems prudent for the executor to bring a new action as soon as he possibly can after the death of his testator, and at all events not to delay it beyond a year.

If an action be brought by a feme sole within six years, and pending the action the six years expire, and then she marries, whereby the suit abates, it has been holden that she and her husband may recently bring a new action within the equity of this clause of the statute, though the second action cannot in the nature of the thing be a continuance of the former writ; as where F. and E. his wife, administratrix of J. C. her late husband, brought their bill in the king's bench against the defendant for money laid out by the intestate; the defendant pleaded *non assumpsit infra sex annos*; the plaintiffs replied that E. when a widow, to wit, on such a day, brought her original writ, and before the return she married F. and they recently afterwards exhibited their bill against the defendant, rejoinder that E. married T. J. who was alive at the time of issuing the original; the plaintiffs sur-rejoined and tendered an issue; to which the defendant demurred; upon judgment given for the plaintiff in the king's bench without argument, a writ of error was brought in the exchequer chamber, where it was argued for the plaintiffs in error that the suit was abated by marriage, the voluntary act of the party; that the statute of limitations was a law of peace for the security of property,

and ought not to be extended by equity; besides a suit commenced by bill cannot be continued by original. It was insisted for the defendants in error that the new suit was brought within a reasonable time, namely, within two terms, whereas it has been holden that a year is a reasonable time. By the court; the statute has received a favourable construction; the suit was originally brought within the six years, and the new suit within two terms, and the statute does not bar the action, it only takes away the remedy; and the judgment was affirmed. *Forbes v. Lord Middleton*, cited in *Mr. Durnford's* note (c) to *Willes's* Rep. 259. *Karver v. James*.

The form of the replication by an executor to a plea of the statute, where he recently brings a new action after the death of the testator, is to state that the testator on, &c. in such a term in such a year of the king's reign sued out a *capias ad respondendum* (for instance), against the defendant, returnable on the morrow of *All Souls*, that the sheriff returned that the defendant was not found in his bailiwick, and then continue the *capias* from term to term down to the time of the testator's death; that he appointed the plaintiff his executor, recently after whose death, to wit, in such a term, &c. the plaintiff sued out the writ upon which the action is founded; that the several writs so prosecuted by the testator against the defendant were with an intent to have impleaded the defendant upon the several promises in the declaration specified; and that the writ sued out by the plaintiff against the defendant was prosecuted against him with intent to implead him

HODSDEN v. king now here is thereof not yet, &c. At which day before **HARRIDGE.** our lord the king at *Westminster* come the parties aforesaid, by their attorneys aforesaid, and because the court of our said lord the king now here, is not yet advised what judgment

Further continuance.

for the causes of action in the declaration specified, and upon his appearance to declare against him for the said several causes of action, and that he afterwards on, &c. declared against the defendant, &c. with an averment that the several causes of action accrued within six years next before the suing out of the writ of *capias ad respondendum* first above specified by the testator, &c.

If the defendant plead the statute of limitations, and the plaintiff take issue upon it, evidence of a promise by the defendant within six years before the commencement of the action, to pay the debt, is sufficient to take the case out of the statute. 6 Mod. 309. *Dean v. Crane*. [q] And though it be a conditional promise, it is sufficient if the plaintiff performs the condition; as where in *assumpsit* for goods sold and delivered, the defendant denied he bought the goods, but said "prove it" and "I will pay you," this promise with a proof of the debt was held to take the case out of the statute. 1 Salk. 29. *Heyling v. Hastings*. 5 Mod. 425.

Carth. 470. 1 Ld. Raym. 389. 422. Com. Rep. 54. S. C. [r] A distinction was formerly taken between a *promise* to pay the debt, and a *bare acknowledgment* of it within that period; the former was sufficient to take it out of the statute, but an acknowledgment did not amount to a promise, but was said to be only evidence of it, and therefore did not of itself take the case out of the statute. 2 Vent. 152. *Bland v. Haselrig*. 6 Mod. 309, 310. *Dean v. Crane*. Carth. 471. 2 Show. 126. *Dickson v. Thomson*. But this distinction is no longer regarded; it being now settled, that an acknowledgment of the debt takes it out of the statute of limitations; per *Price*, baron, Exeter Lent assizes 1717. 12 Vin. 192. MSS.; even though it be after the commencement of the action. 2 Burr. 1099. *Yea v. Fouraker*. And the slightest acknowledgment has been held sufficient, as saying, "I am ready" to account, but nothing is due to "you," or "if he has any demand on" me it shall be settled," will take a debt out of the statute. Cowp. 548. *True-*

[q] So a promise by the agent of the defendant, entrusted in the management of the particular business out of which the debt arises is sufficient. 5 Esp. 145. *Burt v. Palmer*. 2 Esp. 511. n. *Paletthorp v. Furnish*. 1 Campb. 394. *Gregory v. Parker*. 2 Stark. 204. *Anderson v. Sanderson*. Holt. 591. S. C.

[r] But where the defendant promises to pay if he can, the plaintiff must prove the defendant's ability to do so. 4 Esp. 36. *Davies v. Smith*. In the same manner as no action lies on the promise of a bankrupt after certificate, to pay a prior

debt when able, without proof of his ability. 2 H. Black. 116. *Beaford v. Saunders*. However, in 2 Stark. 98. *Thompson v. Osborn*, Lord *Ellenborough* C. J. thought a promise to pay by instalments, if time were given sufficient to take case out of the statute, though there was no evidence that time had been given. So where defendant promised to pay, if others in *Hull* paid, though the plaintiff could not shew that others had paid. 4 Campb. 185. *Loweth v. Fowergill*.

to give of and upon the premises, a day thereof is given to the parties aforesaid, before our lord the king at *Westminster*, until *Wednesday* next after 15 days of *Easter*, then next following, to hear their judgment of and upon the premises, **HODSDEN v. HARRIDGE.**

man v. Fenton, per Lord Mansfield. S.P. 5 Burr. 2630. *Quantock v. England*. It was also holden, that a letter written by the defendant to the plaintiff on being served with a writ, couched in ambiguous terms, neither expressly admitting or denying the debt, should

have been left to the jury to consider whether it amounted to an acknowledgement of the debt so as to take it out of the statute. 2 Term Rep. 760. *Lloyd v. Maund*. 4 East, 599. *Bryan v. Horseman*. [s] 1 Bos. & Pull. New Rep. 20. *Bicknell v. Keppel*. [t] And the

[s] In *Bryan v. Horseman*, the defendant acknowledged the original contracting of the debt, and that part was unpaid, but declared he owed the plaintiff nothing, it being more than six years since he contracted; and this was held enough to take the case out of the statute; see also the case of *Rucker v. Hannay* in a note to *Bryan v. Horseman*. So where the defendant, acceptor of a bill of exchange, acknowledged his acceptance, but said he was not liable then, because it was out of date, and also that it was not in his power to pay it, this was held sufficient to prevent the operation of the statute; 16 East, 420. *Leaper v. Tatton*. So where the defendant being arrested, said that plaintiff had paid money for him 12 or 13 years ago, but that he had since become a bankrupt, by which he was discharged, as well as by law, from the length of time, Lord Kenyon C.J. held the case out of the statute; 3 Esp. 157. *Clarke v. Bradshaw*. But where it was proved that defendant said to plaintiff "I owe you not a farthing, for it is more than 6 years since," the court of C. P. held that this was *not* to be left to the jury as evidence of acknowledgment sufficient to prevent the operation of the statute. 3 Taunt. 380. *Coltman v. Marsh*. And where the defendant in *assumpsit* for money due on an accountable receipt, was proved to have

admitted his signature when called on for payment, but to have said "that it was not worth a penny, that he never had paid it, and never would, and besides that it was out of date, and that no law should make him pay it," this was held *not* sufficient to bar the statute; and the court distinguished the case from *Bryan v. Horseman*, inasmuch as the defendant in that case admitted the existence of the debt, but in this there was no recognition of that nature, and the defendant's assertion drew the same way as the statute; 4 M. & S. 457. *Rowcroft v. Lomas*.

[t] So an acknowledgment to a stranger is enough; 4 Esp. 46. *Peters v. Brown*; or an acknowledgment of the existence of the debt in a deed made between the defendant and a third person. 3 B. & A. 141. *Mounstephen v. Brooke*. And a declaration by defendant that he would not pay unless obliged, was held enough to take the case out of the statute. 4 M. & S. 75. *Dowthwaite v. Tibbut*. So a reference of the plaintiff by the defendant to a trustee, (to whom he had assigned his estate for payment of his debts) is sufficient; 1 Esp. 435. *Baillie v. Lord Inchiquin*; see also *Bicknell v. Keppel* ubi supra. And an observation by defendant to plaintiff of "what an extravagant bill you have delivered me," is a sufficient admission that something

HODSDEN v. HARRIDGE. for that the court of our said lord the king here is thereof not yet, &c. At which day, before our lord the king at Westminster, come the parties aforesaid, by their attornies aforesaid, and because the court of our said lord the king

acknowledgment of one out of several makers of a joint and several promissory note has been holden sufficient to take it out of the statute as against the

others, and may be given in evidence on a separate action against any of the others. As where in an action on a promissory note executed by the defend-

is due, to prevent the operation of the statute. *Peake. N. P. C. 127. Lawrence v. Worrall.* But where defendant said, when asked for payment by the plaintiff, "you owe me more money, I have a set-off against you," it was held (by *Bayley* and *Holroyd* justices, *dissentiente* *Best J.*, *absente* *Abbott C. J.*) that this was not sufficient to bar the statute. 2 B. & A. 759. *Swann v. Sewell.* Nor is a statement by a debtor made to an executor, that the testator always promised defendant not to press defendant for the debt, evidence to prove a promise to pay, made to the testator within 6 years; 6 Taunt. 210. *Ward v. Hunter.* And on the authority of this last case it was decided, where an action was brought against A. & B. & C. B.'s wife, upon a joint promissory note made by A. & C. *dum sola*, and the promise was laid by A. & C. before her marriage, and the defendants pleaded the statute of limitations, whereupon issue was joined, that an acknowledgment of the note by A. within six years, but after the intermarriage of B. & C. was not evidence to support the issue. 1 Barn. & Cress. 248. *Pittam v. Foster.* 2 Dowl. & Ryl. 363. S. C. So where defendant denied the existence of the debt, and added (on being requested to look at documents in proof of it), "It is no use for me to look at them, for I have no money to pay it now," this was held not enough to prevent the operation of 5 Price, 636. *Snook v. Mears.* Nor is the statute barred by defendant, saying

he thought the debt demanded had been settled long ago, but that he had been in such trouble ever since, that he could not recollect any thing about it; 1 B. Moore, 340. *Hellings v. Shaw.* 7 Taunt. 608. S. C. In cases where defendant recognizes the foundation of the debt, but accompanies the recognition with asserting that it is discharged, there is a difference of opinion. In 4 Esp. 184. *Birk v. Guy*, the defendant said, "I have paid the debt, and will send a copy of the receipt." Lord *Ellenborough C. J.* held this an insufficient acknowledgment, and said it was the very case the statute was framed to protect, viz. where a man had lost his evidence of payment. But in 1 Holt N. P. 380. *Craig v. Coz*, *Gibbs C. J.* recognized the authority of a MS. case, in which the defendant had said "that he would satisfy the plaintiff, for he could shew his receipt;" and it had been held, that this was sufficient acknowledgment to go to a jury on failure to produce a receipt. And where the defendant admits the debt, but specifies his discharge by a written instrument which, when produced at the trial, turns out an insufficient one, it seems this is an acknowledgment sufficient to put the case out of the statute. 6 Esp. 66. *Partington v. Butcher.* See post, n. [x] But if the admission be qualified, as where defendant resists payment on an objection which would have exempted him from payment, it is not sufficient.

now here, is not yet advised what judgment to give of and upon the premises, a day thereof is given to the parties ^{HODSDEN v. HARRIDGE.} aforesaid, before our lord the king at *Westminster*, until *Friday* next after the morrow of *Holy Trinity* then next

ant, he pleaded the statute of limitations, and issue being joined upon it, the plaintiff produced a joint and several note executed by the defendant and three others, and proved payment, by one of the others, of interest on the note, and part of the principal, within six years; this being thought by the learned judge who tried the cause sufficient to take the case out of the statute as against the defendant, a verdict was found for the plaintiff; and upon a motion for a new trial, the opinion of the learned judge was confirmed by the court of king's bench, who said that payment by one is payment by all, the one acting virtually as agent for the rest, so an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due: and they seemed to over-rule the case

of *Bland v. Haselrig*. 2 Vent. 151. Doug. 652. *Whitcomb v. Whiting*. [u] And upon the same principle, where one of two makers of a joint and several promissory note became a bankrupt, and the payee received several dividends under his commission on account of the note, and an action being brought against the other maker of the note for the remainder of the money within six years after the receipt of the dividends, who pleaded the statute of limitations, it was adjudged that the payment of the dividends under the commission was such an acknowledgment of the debt as took the case out of the statute of limitations. 2 H. Black. 340. *Jackson v. Fairbank*. [v]

After all, it might perhaps have been as well, if the letter of the statute had been strictly adhered to; it is an extremely beneficial law, on which, as it has been

1 Stark. 7. *De la Torre v. Barclay*. And where the defendant qualified his admission thus, "I acknowledge the receipt of the money, but the testatrix gave it me," it was held not sufficient. Bull. Ni. Pri. 148. *Owen v. Woolley*.

[x] So a letter from one maker of a joint and several note to another desiring him "to settle the money" is sufficient against the writer. 3 Campb. 32 *Halliday v. Ward*. But it is not sufficient to shew a mere payment within six years of a sum of money to the indorsee of a note by one of two joint makers, in an action against the other, although the defendant cannot shew that some other account existed between the joint maker and the indorsee. Lord *Ellenborough* C. J. said that this would be an extravagant extension of *Whit-*

comb v. Whiting; and that unless there be an express and unequivocal acknowledgment of an existing debt by one partner it will not bind the other. 1 Stark. 489. *Holme v. Green*.

[v] But where the holder of a bill of exchange drawn by two persons, one of whom had become bankrupt, did not prove the bill itself, under the commission but proved his debt, and exhibited the bill as a security; the court held that the receipt of a dividend within six years was not sufficient to take the case out of the statute against the other drawer: and they seemed to doubt the authority of *Jackson v. Fairbank*, though they distinguished it from the principal case, and to consider that the doctrine in *Whitcomb v. Whiting*, was hard and ought not to be extended; 1 B. & A.

HODSDEN v. HARRIDGE. following, to hear their judgment of and upon the premises, for that the court of our said lord the king here is thereof not yet, &c. At which day, before our lord the king at *Westminster*, come the parties aforesaid, by their attornies aforesaid; and because the court of our said lord the king now here is not yet advised what judgment to give, a day thereof is given to the parties aforesaid, before our lord the king at *Westminster*, until *Saturday* next after three weeks of *St. Michael* then next following, to hear their judgment of and upon the premises, for that the court of our said lord the king here is thereof not yet, &c. At which day, before

Further continuance.

Further continuance.

observed, the security of all men depends, and is therefore to be favoured. 2 Salk. 421, 422. *Green v. Revitt*. And although it will now and then prevent man from recovering an honest debt, yet

it is his own fault that he postponed his action so long; besides which, the permitting of evidence of promises and acknowledgments within the six years seems to be a dangerous inlet to perjury.[w]

463. *Brandram v. Wharton*; for cases on the exceptions contained in the statute, see post, 127. c. note

[w] The same opinion was expressed by *Gibbs C. J.* in the above cited case of *Hellings v. Shaw*, 7 Taunt. 611. his lordship proceeds to state that there are three cases in which the words of the statute would discharge the defendant, but in which the court have held him liable; one is where the defendant has admitted that the debt is unpaid, but has stated that it was discharged by lapse of time; another is, where the defendant has stated, not that the debt remained due, but that it is discharged by a particular means, (this is confined to a written instrument in the report of this same case in 1 B. Moore, 344.) to which he has with precision referred himself, and where he has designated that time and mode so strictly, that the court can say, it is impossible it can be discharged in any other mode: there the courts have said, "If the plaintiff can disprove that mode, he lets himself in to recover, by striking from under the defendant the only ground on which he professes to rely." A third case

is, where the defendant challenges the plaintiff to produce a particular mode of proof of his liability: there if the plaintiff produces that proof, the courts have said, the defendant shall not be discharged, though the statute says he shall be discharged. See also the case of *Beale v. Nind* in 4 B. & A. 568. 572. as to what cases are within the second class in the judgment of *Gibbs C. J.* It is difficult to say whether the cases have proceeded on the ground, that an acknowledgment is a waiver of the statute; or on the ground, that it is evidence of the defendant's liability on which the law raises a new promise to pay, for which the existing debt is a good consideration. It should seem that they proceed on the latter ground, notwithstanding some observations to be found in the reports, for it is held that an acknowledgment will not take the case out of the statute in actions of tort, which it might well do if it operated as a waiver. 1 B. & A. 92. *Hurst v. Parker*: see also the judgment of *Abbott C. J.* in 1 Barn. & Cress. 256. *Pittam v. Foster*. 2 Dowl. & Ryl. 363. S. C.

our lord the king, at *Westminster*, come the parties aforesaid, by their attornies aforesaid, and because the court of our said lord the king now here, is not yet advised what judgment to give of and upon the premises, a day thereof is given to the parties aforesaid, before our lord the king at *Westminster*, until *Friday* next after the octave of the *Purification of the blessed Virgin Mary* then next following, to hear their judgment of and upon the premises, for that the court of our said lord the king here is therefore not yet, &c. At which day, before our lord the king at *Westminster*, come the parties aforesaid, by their attornies aforesaid. Whereupon all and singular the premises being seen, and by the court of our said lord the king here more fully understood, and mature deliberation being thereupon had, for that it appears to the court of our lord the king here, that the plea aforesaid, by the said *Rowland* in manner and form aforesaid above pleaded, is not sufficient in law to bar the said *Jasper* from having his action aforesaid against the said *Rowland*: It is considered that the said *Jasper* recover against the said *Rowland* his debt aforesaid, and also 10*l.* for his damages which he has sustained, as well on occasion of the detention of that debt, as for his costs and charges by him about his suit in that behalf expended, adjudged to the said *Jasper*, with his assent by the court of our said lord the king now here; And the said *Rowland* in mercy, &c.

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Judgment for
the plaintiff.

Hodsden versus Harridge.

Case 9.

Michaelmas, 20th of King Charles II. Rol. 554.

DEBT on an award by *Hodson* against *Harridge*; the plaintiff declares, that there were divers disputes and controversies between the plaintiff and defendant, concerning certain monies due to the plaintiff for malt sold and delivered by him to the defendant, and for quieting those controversies, the plaintiff and defendant, on the 24th day of *October*, in the 13th year of the reign of the now king, *submitted (7) themselves to the award of two arbitrators, and if they should

S.C. 1 Lev. 273.
1 Sid. 415.
2 Keb. 462.
497. 593. 596.
An award under the hands and seals of the arbitrators is not within the statute of limitations.
* [65]

(7) Where the submission is by rule of court this difference is taken; when the parties intend to refer only the cause, the terms of the rule of reference are "all matters in difference in this cause between the parties;" but when all matters in difference between the parties are meant to be referred, then the

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not agree by a certain day, then to the umpirage of an umpire to be chosen by the arbitrators, so as the umpirage should be under the hand and seal of the umpire before another certain day; and the plaintiff avers that the arbitrators made no award, but chose one *Weekes* to be umpire, who within the time made an umpirage under his hand and seal, and thereby awarded the defendant to pay the plaintiff 15*l.* in full satisfaction of all debts, accounts and demands due to the plaintiff: and for the non-payment of the said 15*l.* the plaintiff brings his action, &c. The defendant pleads in bar the statute of limitations, and that the cause of action did not accrue within six years next before the exhibiting of the bill; and this, &c. therefore, &c. upon which it was demurred in law. And the question was, whether this action of debt on award be within the statute of 21 Jac. 1. c. 16. of limitations or not?

And it was argued by *Saunders* for the plaintiff, in *Trinity* term last past, that it was not within the statute; for the words of the statute are, "all actions of debt grounded upon any lending or contract without specialty, and all actions of arrearages of rent," shall be sued within six years, &c. And he argued, in the first place, that it was a specialty, for the umpire has made his umpirage in writing under his hand and seal, as appears by the record, and therefore it was clearly out of the words and meaning of the statute, which says, "actions of debt without specialty," so that actions of debt upon specialty were not limited, nor intended to be limited by the statute. And although *Jones* for the defendant objected, that the umpirage in writing under the hand and seal of the umpire was not any specialty, because a man cannot wage his law against a specialty, but he may wage his law against an award in writing under hand and seal, unless the submission be by specialty under the hand and seal of the party who submits to such an award, as appears in 2 Roll. Abr. 107. (C.) pl. 3.* it was answered that, notwithstanding the umpirage was not such a specialty as shall oust the party of his law, yet it was a good specialty to prevent the limitation of the action upon it to six years, on account of the notoriety of the thing being in writing under hand and

Actions of debt on specialty are not limited by the statute.

A man may wage his law against an award in writing under hand and seal, unless the submission be by specialty.
* S. P. Cro. Eliz. 557.
Hampton v. Boyer, Ibid.
600. Bowyer v. Garland, Doc. Plac. 40.

language of the rule is, "*all matters in difference between the parties in this cause;*" the terms of the submission in the latter instance being descriptive

of the parties in the cause, and not of the particular cause between the parties. 2 Term Rep. 647. *Malcolm v. Fullarton*.

seal. For the statute intends to limit those actions only which arise upon a bare contract without any writing under seal, the prosecuting of which actions a long time after they first accrue, was often a great occasion of perjury in witnesses, and of oppression to the defendant in such actions. And this case may be compared to the case of an action of account, where, if the plaintiff declare against the defendant on a receipt *by his own hands*, the defendant shall wage his law; but if the plaintiff declares on a receipt *by other hands*, the defendant shall be ousted of his law, on account of the presumption of law that the country had notice of it (a).

* And where the statute says that all actions of debt for arrearages of rent shall be limited, &c. it has been in construction confined to mean those actions of debt for arrearages of rent which is reserved on a parol lease, and not a lease in writing; and therefore in *Hutton's* reports, 109. † an action of debt for arrearages of rent reserved on a lease by specialty (8) was adjudged not to be limited by the statute, although the words of the statute are general, namely, "all actions of debt for arrearages of rent," wherefore it was concluded that here was a sufficient specialty to prevent the statute of limitations. And of such opinion was *Kelynge* chief justice strongly. Then it was argued upon the second point, that admitting there was no specialty at all, yet an action of debt on an award was not limited by the statute, for the words being as before, "all actions of debt grounded upon any lending or contract without specialty, &c." therefore all actions of debt without specialty *generally* are not limited, but only all actions of debt without specialty which are grounded *upon any lending or contract*: and here this action of debt is not founded upon any lending, and therefore it is not limited, though it be without specialty. And as to the objection on the other side, that in the present case the *law* raises a con-

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The statute limits such actions only as arise on a bare contract without writing. In an action of account, if plaintiff declares on a receipt by the hands of the defendant he may wage his law, but if by other hands he shall be ousted of his law.

* [66] Debt for rent reserved on a parol lease, and not on a lease in writing, is limited by the statute.

† *Freeman v. Stacy.*

(8) So the statute of limitation 32 H.8. c.2. does not extend to actions founded upon a deed or specialty; and therefore, if an avowry be for rent created by deed, as for a rent charge, it is not within that statute, or for rent upon a reservation by deed, for the reservation will be the title. Co. Litt. 115. a. Moor, 31. pl. 102. Hutt. 109. 8 Rep. 64 b.

Foster's case. Sir W. Jones, 237, 238. *Faulkner v. Bellingham.* So if a rent be originally created by act of parliament. Cro. Car. 81. *Faulkner v. Bellingham.*

(a) Comyn's Rep. 272. *Walker v. Holyday.* Willes's Rep. 208. *Wheeler v. Horne.*

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tract, as, on a judgment or recovery in trespass or trover, the law gives an action of debt as upon a contract raised by law, and therefore this case is within the express letter of the statute, being a debt grounded on a contract raised by law, it was answered, that all actions of debt whatsoever are founded upon a contract raised either in fact or by construction of law, and by such an exposition, all actions of debt without specialty generally will be limited by the statute, which without question was not the true meaning of it; for if it had been so, the words "grounded upon any lending or contract" had been needless and superfluous; but the statute intends to restrain and limit those actions only which were founded upon any lending or contract *in fact* as appears by the words; and the word *lending* explains the word *contract* to be of the same nature. And in the present case, the action of debt is not founded upon any *lending* or *contract*, but it is a debt *ex quasi contractu*, as the civilians term it, for which the law gives an action of debt, although there is no contract between the parties: so it is of a recovery in trover or trespass in the county court, or court baron; and the case of debt for an amerciament in a court baron, and so in 11 H. 7.* debt for 3l. for a pound breach by the custom of the manor, are all of them actions of debt without specialty, because the defendant may wage his law against them, and yet they are not founded upon any *lending* or *contract* between the parties; and in the two last cases the debt is no contract, but is rather *debitum ex delicto*; and because those actions so rarely occur, and the actions of debt founded upon express contracts between men without specialty are so frequent every day, the statute intends to restrain and limit the last mentioned actions, without having any regard to the others on account of the paucity of them, from the non-limitation of which the makers of the statute did not find any such inconvenience as they found in the non-limitation of actions of debt founded upon contracts in fact; *et ad ea quæ frequentius accidunt jura adaptantur*, as is said in *Sherwin and Cartwright's* case †, where it is adjudged that an action *de rationabili parte bonorum*, (9)

[67]
* 13. h. 14. a.
S. C. Bro.
Debts 240.
Prescription
106.

† Hutt. 109.

(9) This writ lies, where the wife after the death of her husband cannot have the third part of her husband's goods after payment of debts and funeral expenses, and then she may have

this writ against the executors of her husband. And it seems by the statute of *magna charta*, c. 18. that this was the common law of the realm at that time; and it appears by Glanvil that

although in its nature it is only an action of detainee, which is expressly limited by the statute, yet it was not within the statute of limitations, because it was an action which seldom happens; and therefore it was concluded, that this action was not within the statute of limitations. HODSDEN v.
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Jones for the defendant argued, that it was within the statute, and strongly enforced the two objections before mentioned; but after it had been twice argued in *Trinity* term, the whole court resolved for the plaintiff. *Kelynge* chief justice, principally for the first point, that there was a sufficient specialty to prevent the statute of limitations; and *Twysden* justice, principally for the second point, that this action was not within the limitation of the statute at all, because it was not founded upon any lending or contract; the other judges consenting to both points; wherefore a

it was the common law in his time, that after payment of debts, the goods were divided into three parts; one part to the wife, another part to the sons and daughters, and the third to the exe-

cutors; and the sons and daughters are also entitled to have the like writ against the executors in case their third part is withheld. F. N. B. 284. 7th edit. See 2 Black. Comm. 491, 492. [x]

[x] Where it appears that this writ cannot now be had against executors; for the law has been "altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began." 2 Bl. Com. 492. The old law prevailed in *London*, in the province of *York*, and in the principality of *Wales*, into very modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided, one 4 & 5 W. & M. c. 2. explained by 2 & 3 Ann. c. 5. for the province of *York*; another, 7 & 8 W. 3. c. 38. for *Wales*; and a third, 11 Geo. 1. c. 18. for *London*; whereby it is enacted, that persons within those districts, and liable to those customs, may, (if they think proper,) dispose of *all* their personal estates by will; and the claims of the widow,

children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of *England*, and a man may devise the whole of his chattels as freely as he formerly could his third part or moiety. 2 Bl. Com. 493.; but neither these statutes nor the statute of distributions (22 & 23 Car. 2. c. 10. explained by 29 Car. 2. c. 30.) affect the local customs above mentioned with respect to the general division of an *intestate's* personal property: so that in the places where they prevail, the effects of an *intestate*, after payment of his debts, are divided according to the antient universal doctrine of the *pars rationabilis*, but with this difference, that the portion (called the dead man's part) which the administrator was wont to apply to his own use, is made (by stat. 1 Jac. 2. c. 17.) subject to the statute of distributions. 2 Bl. Comm. 518.

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rule was given for judgment for the plaintiff, unless cause, &c.; but on the day of shewing cause, *Jones* moved, that the demurrer might be waved, and the defendant be permitted to plead the general issue: and because *Saunders* would not consent, it was adjourned over to *Michaelmas* term, and hung until this term; and it being now in the paper of causes, it was moved again for judgment for the plaintiff; and *Jones* would have spoken to it, but *Twysden* justice said, that it was resolved by the court, in *Trinity* term before, for the plaintiff on both points; wherefore, in the absence of *Kelynge*, he gave a rule for judgment, and the plaintiff had his judgment accordingly; whereupon the defendant brought a writ of error, but was afterwards nonsuited, as I was informed (10).

(10) So where the statute of limitations 21 Jac. 1. was pleaded to debt upon the 2 & 3 Edw. 6. for not setting out tithes, it was held on demurrer that the statute does not extend to this action. Cro. Car. 519. *Talory v. Jackson*. [y] So debt on an escape is not within the statute. 1 Saund. 37, 38. *Jones v. Pope*. Nor debt for a copyhold fine: for it is not founded upon a contract or lending. 1 Lev. 278. *Hodgson v. Harris*, per *Twysden* justice. So

debt against a sheriff for money which he levied upon a *fieri facias* is not within the statute. 2 Mod. 212. *Cockram v. Welby*. But by statute 3 & 4 Ann. c. 9. s. 2. actions on promissory notes, which in some measure partake of the nature of specialties, particularly in the manner of declaring upon them, shall be brought within the time appointed for commencing actions upon the case by the statute 21 Jac. 1. [z]

[y] But now the action is limited to six years by 53 Geo. 3. c. 127. s. 5. see ante, Vol. I. 38. note [i].

[z] The statute is a good defence to an action for rent against one who had been tenant from year to year, but had not within six years occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit. 1 B. & A. 625. *Leigh v. Thornton*. A warrant of attorney to confess judgment is not a specialty which takes a case out of the

statute; therefore where an action was brought by the executors of the creditor to whom the warrant of attorney was given more than six years after the date of it, and there was no other evidence of acknowledgment, the plaintiff was nonsuited. 2 Stark. 234. *Clarke v. Figes*. It was held by lord Eldon C.J. in 3 Esp. 81. *Spears v. Hartley*, that a creditor who has a general lien for his balance, obtaining goods of his debtor, may hold them by virtue of that lien, for a demand barred by the statute of limitations.

Underhill *versus* Devereux.

Case 10.

Easter, 21st King Charles II. Roll. 558.

OUR lord the king hath sent to the sheriff of *Warwickshire* his writ close in these words, to wit: *Charles* the Second, by the grace of God, of *England, Scotland, France* and *Ireland*, king, defender of the faith, &c. to the sheriff of *Warwickshire*, greeting: Whereas *Walter Devereux* esq. lately in our court, before us at *Westminster*, by bill without our writ, and by the judgment of the said court, recovered against Sir *William Underhill*, knight, 1558l. for his damages which he sustained as well on occasion of certain trespasses and assaults lately committed by the said Sir *William* on the said *Walter*, as for his costs and charges by him about his suit in that behalf expended, whereof he is convicted, as appears to us of record: And whereas the said *Walter* afterward, to wit, on the 30th day of *May* in the 14th year of our reign, came into our court before us at *Westminster*, and chose (1)

Scire facias ad computandum.

W. D. recovered a judgment in K. B. against W. U. for 1558l.

and prayed an *elegit*.

(1) At common law, the conusee of a recognizance, [a] or a plaintiff who had recovered judgment for *debt* or *damages*, was entitled only to two writs of execution, which he was bound to sue out within a year after the recognizance or judgment; one, a writ of *levari facias*, by which the sheriff might levy the corn, and other present profit which grew upon the land, and the rents payable by the tenants, and the beasts levant and couchant upon the land; because in all cases of *levari facias* the land is considered as the debtor. Plow. 441. *Davy v. Pepys*. Skin. 619. *Breton v. Cole*. See ante, p. 6. *Jefferson v. Morton*, note (1); and the other a writ of *feri facias*, by which the sheriff was to seize the goods and

chattels in execution. Indeed, in all actions of trespass *vi et armis*, because the act was committed with force, the law allowed the defendant to be arrested on mesne process by a writ of *capias ad respondendum*: and if the plaintiff recovered judgment he might sue out a writ of *capias ad satisfaciendum* against him; it being a rule that where a *capias* lies in process, a *capias ad satisfaciendum* will lie after judgment. 3 Rep. 11 b. 12 a. Sir *William Harbert's* case, 2 Inst. 394. The first time that *land* was subjected to the execution of a judgment or recognizance, was by the statute of *Westminster* 2. (19 Edw. 1.) c. 18. which enacts, that "when debt is recovered " or acknowledged in the king's court,

[a] A recognizance is an acknowledgment or obligation of record, but it is not perfect until it is enrolled: therefore the word "recognizance" does not of itself import a record, and

in pleading a recognizance the enrolment must be averred, or the opposite party is not bound to treat it as a record, but may reply *nil debet*. 1 B. & A. 153. *Glynn v. Thorpe*.

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to be delivered to him all the goods and chattels of the said Sir William, except the oxen and beasts of his plough, and also a moiety of all the lands and tenements of the said Sir William in your county, to hold to him and his assigns by a reasonable

"or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of *feri facias* unto the sheriff to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels, (saving only his oxen and beasts of his plough,) and the one half of his land, until the debt be levied, upon a reasonable price or extent. And if he be put out of that tenement, he shall recover by a writ of *novel disseisin*, or after, by a writ of *redis-seisin*, if need be." This writ is called an *elegit*, because the plaintiff or conusee has made his election to sue out execution of the land itself which is given by this statute, instead of the common law execution of the goods by *feri facias*; the entry, when the proceedings were in Latin, being, that the plaintiff "*elegit sibi liberari omnia catalla, &c. nec non medietatem terræ*," as in the above precedent. Co. Litt. 289 b. 2 Inst. 395. See the form of the writ, Thes. Brev. 93. Tidd's Pract. Forms, 345. Lill. Ent. 571—578. 1 Richards. Prac. C, P. 281, 282. 5th edit.; see also the entry of an award of an *elegit* on the roll, Thes. Brev. 94. Lill. Ent. 210. Mountford v. Lord Griffin. Lib. Plac. 455. pl. 38. Tidd's Pract. Forms, 349.

The plaintiff may award upon the roll writs of *elegit* for the whole debt into as many different counties as he pleases, without being under the necessity of suing out *testatum* writs of *elegit*, and execute all or any of them at his pleasure. Dyer, 162 b. pl. 51. Moor, 24. pl. 83. Earl of Worcester's case. Cro. Jac. 246. Goodyere v. Ince. S. C. Yelv. 179. The entry of an award of writs of

elegit into different counties may be seen in Thes. Brev. 94. Clift. 877.; see also in Rast. 261 b. pl. 3. the form of the return of the inquisitions by the sheriffs of the several counties. It is also said, that the plaintiff may divide his execution into several sums, as where he recovers 30*l.* he may have an *elegit* into one county for 10*l.*, another *elegit* into another county for 5*l.* and another for the residue into a third county. Dyer. 162 b. pl. 51. Moor, 24. pl. 83. 2 Roll. Abr. 469. pl. 6. 1 Str. 461. Oates v. Robinson; but an award of an *elegit* into several counties for the whole debt seems to be the most proper way, because the judgment is intire. If a writ of *elegit* be sued out, and the plaintiff extend the land upon it, and return and file the writ, it was long doubted, whether he should afterwards have an *elegit* into another county, or for other lands in the same county; but it seems to be now settled, that on a suggestion that the defendant has more lands, either in the same or another county, the plaintiff may have a new *elegit* for a moiety of the land in whatever county it lies. Moor, 341. Hunger v. Frey. 1 Roll. Abr. 404. pl. 6. Sty. 454, 455. Stroud v. Keckwith. Hob. 57. Foster v. Jackson.

Indeed it was formerly holden, that the bare entry of a *prayer* in the *elegit* upon the roll, was a bar to all other executions; for the plaintiff or conusee, having made his election to take this remedy, had precluded himself from resorting to any other kind of execution. 1 Roll. Abr. 904. (Y.) pl. 1. And this continued to be the law down to the time of Lord Coke, who says that a good clerk never enters an award of an *elegit* on the roll, until he has the effect of

price and extent, according to the form of the statute thereof lately made and provided, until the damages aforesaid should be thereof fully levied; whereupon by our writ, we commanded the sheriff of the said county of *Warwick*, that he

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his execution. Cro. Jac. 338. *Crawley v. Lidgate*. However it was at that time holden, that if, after an award of an *elegit* on the roll upon a judgment in C. B., it was removed by error into the K. B. and affirmed within the year, the plaintiff might have execution by *capias*, or *feri facias*, even though a writ of *elegit* was sued out, and returned by the sheriff into the C. B. served, before the judgment was removed into K. B.; because that court could not take notice of it. 1 Roll. Abr. 905. pl. 2. 4. But on further consideration of the statute of *Westminster* 2. it was adjudged, that an award of an *elegit* on the roll should be no longer a bar to an execution by *capias ad satisfaciendum*, or *feri facias*, but only the sheriff's return, that he had delivered land according to the exigence of the writ. Hob. 57, 58. *Foster v. Jackson*. 1 Lev. 92. *Glascock v. Morgan*. 2 Ld. Raym. 1451. *Lancaster v. Fielder*. 12 Mod. 356, 357. *Pullen v. Purbeck*. Therefore now if the sheriff returns *nil* to an *elegit*, the plaintiff may sue out a *capias ad satisfaciendum*. Cro. Eliz. 160. *Knowles v. Palmer*. Or if nothing be done or returned upon an *elegit*, the plaintiff or conusee shall have a *feri facias*. Moor, 545. pl. 724. *Cooper v. Langworth*. So if the sheriff return that he has taken an inquisition of the defendant's lands, but could not deliver a moiety to the plaintiff, because it was already extended, the plaintiff may have a *capias ad satisfaciendum*, or *feri facias*, for the sheriff does not deliver the lands, which is the only bar given by the statute. 1 Roll. Abr. 905. pl. 6. 1 Leon. 176. *Palmer v. Knowllis*. So if the sheriff levy part of the debt upon the goods of the de-

fendant, and return *nil* as to the lands, the plaintiff may sue out a *capias ad satisfaciendum* for the residue. 1 Str. 226. *Bacon v. Peck*. Or he may have debt upon the judgment. 1 Lev. 92. *Glascock v. Morgan*; where debt was brought upon the judgment after a part of the debt had been levied. The same point was also holden on the authority of this case in *Hesse v. Stevenson*, 1 Bos. & Pull. N.R. 133.; and that the defendant might be held to bail.

The reason why a *capias ad satisfaciendum*, or a *feri facias*, cannot be sued out, after the sheriff has delivered the land, seems to be, because when an *elegit* is extended upon the land of the defendant, and returned and filed, it is considered in law as a full satisfaction and end of the suit; insomuch that, if the land were afterwards evicted, the tenant by *elegit* was not intitled to a re-extent, but only to a writ of *novel disseisin* or *re-disseisin*, given by the statute of *Westminster*, for the law reposes him satisfied. Cro. Jac. 338. *Crawley v. Lidgate*. But now by statute 32 H. 8. c. 5. it is enacted, that if lands delivered in execution on a judgment, statute, or recognizance, shall be evicted, without fraud or default of the tenant who holds them in execution, before the debt and damages are wholly levied, the recoveror, or conusee, may have a *scire facias*, out of the same court from whence the execution did proceed, against the person on whom the execution was first sued, his heirs, executors, or assigns, of lands then liable to the execution, returnable in the same court 40 days after the date of the *scire facias*; and if the defendant makes default, or shews not cause, the chancellor, or justices of the court where the *scire*

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should cause to be delivered to the said *Walter*, by a reasonable price and extent, all the goods and chattels of the said Sir *William* in his bailiwick, except the oxen and beasts of his plough, and also a moiety of all the lands and tenements

facias is returned, shall make a new writ, of the like nature of the former execution, for levying the residue of the debt. This statute is by a favourable construction extended to the executors, administrators, and assigns of the recoveror. Co. Lit. 290. a. And though the statute gives a *scire facias* out of the same court, yet if the record be removed by error into another court and affirmed there, the tenant by execution who is evicted shall have a *scire facias* by the equity of the statute out of that court. Ibid. But still if *part* only, and not the whole, of the land be evicted; indeed if all but one acre be evicted, or the whole for a time, as by a prior judgment, the plaintiff or conusee shall not have a re-extent under this statute, but must hold the residue until he be satisfied. Co. Litt. 289. b. 4 Rep. 66 a. *Fulwood's case*. Cro. Jac. 338. *Crawley v. Lidgate*.

In like manner if the plaintiff has levied part of the debt by a *feri facias*, he may afterward have an *elegit* for the residue, in which he must recite the *feri facias*, and shew how much was levied upon it. Hob. 58. *Foster v. Jackson*. 1 Sid. 91. *Berry v. Wheeler*. See the form, Thes. Brev. 94. Tidd's Prac. Forms, 351. So if the plaintiff sues out an *elegit*, and the sheriff levies *goods only* under it for part of the debt, and returns that the defendant has no lands, the plaintiff may sue out another *elegit*, as well as any other execution, and take the lands for the residue, or he may have an action of debt for the residue, as already observed; for in that case it is in effect nothing else but a *feri facias*. Hob. 58. *Foster v. Jackson*. 1 Roll. Abr. 905. pl. 5. 1 Lev. 92. *Glasecock v. Morgan*. S. C. 1 Sid. 184. 2 Ld. Raym. 1451. *Lancaster v. Fielder*:

1 Str. 226. *Bacon v. Peck*. 1 Bos. & Pull. N. R. 133. *Hesse v. Stevenson*. So if an *elegit* be returned *nihil* in one county, the plaintiff may have a *testatum writ* of *elegit* into another county. Bro. Executions, 72. *Elegit*, 11. S. C.; but it is said, that a writ of *elegit* must be actually sued out and returned *nihil* by the sheriff, in order to warrant a *testatum elegit* into another county; for if several writs of *elegit* be awarded on the roll to different counties, and a *testatum elegit* is taken out to one of them, grounded upon a supposed *elegit* issued to the county where the venue is laid, and returned *nihil*, when in truth no such writ was ever sued out, or returned, the *testatum elegit* is erroneous; therefore where there are several writs of *elegit* awarded on the roll, care must be taken that writs of *elegit* only and not *testatum* writs be issued. Cro. Jac. 246. *Goodyere v. Ince*. S. C. Yelv. 179. It is holden that the executors or administrators of the plaintiff may have execution by *elegit* as well as the plaintiff himself, but they cannot sue it out without a *scire facias* even within the year. 2 Inst. 395.

The words of the writ of *elegit* are, "To hold as his freehold," because the statute in case of eviction gives remedy by assize: still however, tenant by *elegit* has no freehold, but only a chattel interest, which will devolve upon his executors. 2 Inst. 396. It is said, that an *elegit* may be sued out after a year without a *scire facias*, merely upon awarding an *elegit* upon the roll within the year, and continuing it down by *vicecomes non misit breve* to the time of suing out the writ, Carth. 283. *Seymour v. Greenville*; and this appears

of the said Sir *William*, in the county of *Warwick* aforesaid, to hold the said goods and chattels, as his proper goods and chattels, and also to hold the said moiety of the lands and tenements aforesaid as his freehold, that is to say, to him

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to be warranted by the precedents. Clift. 874. 883. However it seems questionable, whether an *elegit*, or some other writ of execution ought not to be sued out within the year, and returned and filed, to warrant the entry of the continuances; for in a subsequent case, it was adjudged that an execution cannot be continued on the roll unless it be returned and filed. 2 Wils. 82. *Blay v. Baldwin*. And this is most agreeable to the manner of continuing writs on mesne process, which cannot be so done, unless the writ be returned by the sheriff *non est inventus*, and filed. See 1 Sid. 60. *Welden v. Grog*. Comberb. 346. *Vincent's case*. 7 Mod. 50. *Withers v. Harries*. S. C. 2 Lord Raym. 806. And in practice it is the constant course to shew that the writ is returned. [6] The continuing of a writ of execution differs in one respect from that of a writ of mesne process; in the latter, the same species of writ must be continued down, but with respect to executions, it is held, that one sort of writ sued out, returned, and filed, will support the awarding of a different kind of execution afterwards; thus a *copias ad satisfaciendum*, or *elegit*, may issue after the year, upon a *fiore facias* sued out, returned, and filed within the year. As where a *fiore facias* was taken out within the year, and *nulla bona* returned, and continued down for several years, and then a *copias ad satisfaciendum* issued. The court, after taking

time to inquire, said, that if it was a new case, they should think it hard to take away all writs of *scire facias*, but the practice had gone so far that there is no overturning it now, wherefore the execution was held regular. 1 Str. 100. *Aires v. Hardress*.

The word "*price*," mentioned in the statute, is referable to the defendant's goods and chattels, and "*extent*" to the defendant's lands. 4 Rep. 74 b. *Palmer's case*. 2 Inst. 396. The *elegit* is of a moiety of all the lands which the conusor or defendant was seised of at the time of the judgment or recognisance, or after. 2 Inst. 395. Dalt. Sher. 134. And the sheriff may under it either extend a term for years, that is, may deliver a moiety thereof to the plaintiff or conusee, or sell the whole term as part of the personal estate to the plaintiff, at a gross price appraised and settled by the jury; 2 Inst. 395. 8 Rep. 171, a. *Fleetwood's case*, Dalt. Sher. 137. And if the defendant tenders the money at the time of the appraisal, and before the delivery of the term, or even afterwards in court, the term is saved; and if it be delivered after, the defendant is intitled to an *audita querela*; but if no such tender be made, the property in the term is altered by the delivery of the sheriff, and the plaintiff may either keep, or dispose of it, without being accountable for the profits. Moor, 873. *Comyn v. Brandlyn*. Gilb. Executions, 34.

[6] And accordingly in *Putland v. Putland*, E. 57 Geo. 3. K. B., cited in Tidd's Practice, p. 1136, the court of K. B. is reported to have set aside

an *elegit* issued after the year, without a *scire facias*, or any previous writ to warrant it.

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and his assigns, according to the form of the statute in that case lately made, until the damages aforesaid should be thereof fully levied; and in what manner he should have executed that precept, he should make appear to us at

But if the term be *extended* at an annual, and not a gross, value, the plaintiff is accountable for the profits, and if he receives the debt out of the term before it expires, the defendant shall be restored to the term itself. Gilb. Exec. 35. If a term be either appraised or sold under an *elegit*, the commencement and end of the term must be found by the inquisition according to Lord Coke, 4 Rep. 74 a. *Palmer's case*; who says, that if it be found by the inquisition that the debtor is possessed of lands for a term of divers years yet to come, it is insufficient, though the sale of such an uncertain interest under a *feri facias* is good, because in his return to the last writ he only says that of the goods and chattels he caused to be made: see 3 Term. Rep. 295. *Taylor v. Cole*; and this opinion is adopted by Dalton (Sheriffs 199.) and Lord chief baron Gilbert, (Executions, 35.) But in the report of *Palmer's case* by Croke, he says, that it was holden, that if the inquest find that the debtor is possessed for a term of years yet to come, which they appraise at so much without shewing the certain beginning or determination, it is well enough: for they shall not be compelled to find a certainty, not having means to be informed of it. Cro. Eliz. 584. *Palmer v. Humphry*. And this seems warranted by 3 Leon. 204. *Rush v. Heighgate*. The two reports may perhaps be reconciled by this distinction, that when the whole term is appraised and sold for a gross sum as part of the debtor's personal estate, then, as the *elegit* is considered in the nature of a *feri facias*, the sheriff may sell such an uncertain interest under it as well as under a *feri facias*; but when a

moiety of a term is *extended at an annual value*, so general a finding by the inquest may perhaps be insufficient; but see Lane, 50, 51. *Shoftbey v. Waller*. But they both agree, that if the sheriff sell a term either under a *feri facias*, or *elegit*, and misrecite it in date, or time of duration in the former case, or the jury mistake it in the latter, the sale is void; unless he also sells all the interest which the defendant has in the land, for then it is good notwithstanding the misrecital. Hence it appears, that, to avoid all difficulties and niceties on this subject, it is much more advisable to sue out a *feri facias* against the debtor's goods, and if they are insufficient to satisfy the debt, to take out an *elegit* against his land for the remainder of the debt; for where an *elegit* is taken out, if the goods and chattels are sufficient to satisfy the whole demand, the sheriff ought not to extend the land. 2 Inst. 395. So the sheriff must deliver the goods of the defendant to the plaintiff at the price they are appraised at by the inquisition, in which respect an *elegit* differs from a *feri facias*; for in the latter the sheriff cannot deliver the goods, though he may sell them, to the plaintiff. 1 Ld. Raym. 346. *Pullen v. Furbecke*. And he must return that he delivered the term or goods at a reasonable price fixed by the jury. Dy. 100. a. pl. 71. and in the margin. If the judgment be reversed, the defendant shall be restored to the term or goods in specie, and not to the value; but where the goods are sold under a *feri facias*, the defendant is intitled only to the money which has been made by the sale. Cro. Jac. 246. *Goodyere v. Ince*. S. C.

Westminster, on *Thursday* next after three weeks of *St. Michael*, remitting to us there then that writ. At which day *Thomas Boughton* esq., then sheriff of the county of *Warwick*, returned to us at *Westminster* a certain inquisition (2) taken before him at *Mereden* in the said county, on

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Sheriff returned
an inquisition.

Yelv. 179. 1 Roll. Abr. 778. (J.) pl. 1. 3, 4.

A judgment binds not only the lands of which the defendant is actually seised, but also reversions on leases for lives or years, and therefore a moiety of a reversion may be extended, and the plaintiff shall have a moiety of the rent. 1 Roll. Abr. 894. pl. 5. 3 Leon. 113. *Bishop of Bristol's* case. Moor, 36. So rent charges may be extended, for they issue out of land. Bro. *elegit*. 13. Moor, 32. And by the statute of frauds, 29 Car. 2. c. 3. s. 10. lands held in trust may be extended in the hands of trustees for the debt of *cestui que trust*. [c] And lands in ancient demesne are extendible, for the defendant has the property of the land itself; and on this execution the title of the lands is not questioned, but the judgment put in force. Hob. 47, 48. *Cox v. Barnsly*. But copyholds lands are not extendible, because the freehold is in the lord, and the copyholder is no more than a tenant at will according to the custom of the manor; besides which, it was thought unreasonable that the lord should have a new tenant put upon him without his consent. 3 Rep. 9 a. *Heydon's* case. 1 Roll. Abr. 888. (M.) pl. 2. Neither can an advowson *in gross* be extended on an *elegit*, because a moiety cannot be set out, nor can it be valued at any certain rent towards payment of the debt. Gilb. Exec. 39. An *elegit* does not lie of the

glebe belonging to the parsonage or vicarage, nor of the church-yard. Ibid. 40. But it is said that the lands of a bishop may be extended on an *elegit*. Dalt. Sher. 136. So may the wife's lands which the husband has during the coverture. Ibid.

(2) When an *elegit* is prayed, the sheriff must take an inquisition, for he cannot appraise the goods, or value and extend the lands himself, but the same must be done through the medium of a jury. Dy. 100. 2 Inst. 396. Cro. Eliz. 584. *Palmer v. Humphry*. S. C. 4 Rep. 74. Dalt. Sher. 134. No notice is necessary to be given of executing the *elegit*.

The inquisition ought to find the lands with convenient certainty, for to find no certain estate will be insufficient. Moor, 8. pl. 28. And after the inquisition is taken, the sheriff must deliver a moiety by metes and bounds. Hutt. 16. Dalt. Sher. 135. 1 Vent. 259. *Anon*. Cro. Car. 319. *Sparrow v. Mattersock*. Doug. 476. *Den v. Ld. Abingdon*; and if he do not, the inquisition is bad and may be quashed for uncertainty. Carth. 453. *Pullen v. Birkbeak*. [d] And if the parcels delivered by the sheriff amount to more than a moiety, the inquisition is void for the whole. 1 Sid. 91. *Berry v. Wheeler*. 1 Ld. Raym. 7, 8. *Pullen v. Birbeck*: and in an ejectment upon it, advantage may be taken of this nullity. 2 Salk. 563. *Putten v. Pur-*

[c] See ante, Vol. II. p. 11. note (17).

[d] The return of the sheriff is ill if he omit to state that he delivered a moiety by metes and bounds; and the

objection may be taken at nisi prius on the trial of an ejectment brought upon the *elegit*. 1 B. & A. 40. *Fenny v. Durrant*.

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Inquisition set
out.

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the 19th day of *October* in the 14th year of our reign, by the oath of twelve good and lawful men of the said county, by virtue of the said writ to him directed, by which it was found, that the said Sir *William Underhill*, on the day of the giving of the said judgment was seised in his demesne as of fee, of, and in divers lands and tenements, and that a moiety of all the lands and tenements, to wit, one capital messuage, and two closes of pasture called *New Piece* and *Broadleasow* in *Idlicott* of the clear yearly value in all issues beyond reprises of 70l.; one messuage with the appurtenances in *Idlicott* in the occupation of one *William Martin*, and 90 acres of land to

beck; but *Carthew* in his report of the last case makes Lord *Holt* say that the inquisition is not void, but voidable only by error, or an *audiid querelâ*. If the defendant be joint-tenant, or tenant in common, it ought to be specially mentioned in the inquisition. Hutt. 16. 1 Brownl. 38.

But the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety of the whole. As where in ejectment an inquisition was produced which mentioned by name all the different farms and tenements of which the defendant's estate in the county consisted, with their value, the number of acres in each, the tenants' names, yearly value besides reprises, and the clear yearly amount of the whole; and then, repeating the names of a certain number of them, their number of acres and yearly amount, it found that those particular farms and tenements were a true and equal moiety of all the said lands and premises of the defendant in the county, "which moiety of the said lands and premises, I the said sheriff, on the day of taking this inquisition, have caused to be delivered to the lessor of the plaintiff, by the price and extent aforesaid;" and upon production thereof, it was objected that the inquisition was void on the face of it, for that a moiety of each farm ought

to have been extended and delivered, and not a certain number of distinct farms amounting in value to a moiety of the whole. The court of K. B. overruled the objection, and *Buller J.* said that the inquisition and return were good, though separate lands had been extended, provided it did not appear that they amounted in value to more than a moiety of the whole, and cited 2 Salk. 563. 1 Sid. 91. Cro. Car. 319. The objection went not only to every farm, but to every close and field; and that, according to this notion, the writ could not be executed but by delivering an undivided moiety; yet most clearly that was not the meaning of the statute, for it was agreed, that the moiety extended must be set out by metes and bounds. He took the meaning to be a moiety in value which is ascertained by the jury: and the case of *Lord Stamford v. Nedham*, 1 Lev. 160. was denied. Doug. 473. *Den v. Earl of Abingdon*. Soin Bro. Elegit, 14. it is said by *Littleton*, that where an *elegit* issues against one who has two manors, the sheriff may deliver one manor to the plaintiff in the name of a moiety of the whole, and is not bound to deliver a moiety of each manor, and the same of two acres: but says *Broke*, this seems to be where they are of equal value.

the said messuage belonging, of the clear yearly value in all issues beyond reprises of 6*l.*; one other messuage with the appurtenances in *Idlicott* aforesaid in the occupation of one *Henry Allys*, and 90 acres of arable land to the said messuage belonging, of the clear yearly value in all issues beyond reprises of 6*l.*; and one messuage in the occupation of one *Mark Marshall*, and 90 acres of land to the messuage belonging, of the clear yearly value in all issues beyond reprises of 6*l.*; six cottages with the appurtenances in *Idlicott* aforesaid in the several tenures of H. S., T. J., W. H., T. B., J. T., and E. M. widow, of the clear yearly value in all issues beyond reprises of 6*s.*; several closes of land and pasture in *Idlicott*, aforesaid, in the tenure of W. B. gent. called by the name of *Nastene Hedge Close*, and the rough ground near unto *Hawford*, of the clear yearly value in all issues beyond reprises of 80*l.*; several closes of pasture in *Idlicott* aforesaid in the several tenures of V. W., T. F., and M. B., called *Old Dikes*, or the upper grounds near *Baile*, of the clear yearly value in all issues beyond reprises of 60*l.*; two closes of pasture in the tenure of T. B. called the *New Piece* and the *James*, of the clear yearly value in all issues beyond reprises of 20*l.* which said moiety the said sheriff on the day of the taking of the said inquisition caused to be delivered to the said *Walter Devereux*, to hold to him and his assigns, according to the form of the statute thereof made and provided, until he should have thereof fully levied the damages in the said writ specified, as by the said writ and inquisition remaining in our court before us here of record (3) more fully appears.

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A moiety delivered to the said W. D.

(3) It is essential, that the *elegit* and inquisition taken by the sheriff should be returned and filed, when land is extended by the writ. 5 Rep. 90 a. *Hoe's* case. 4 Rep. 67 a. *Fulwood's* case. Dy. 100. a. in marg. But if the sheriff returns on the *elegit* that the defendant has no land, he need not return any inquisition at all. 2 Str. 874. *Stonehouse v. Ewen*. If the inquisition be void for uncertainty, or because more than a moiety is delivered, or for any other defect appearing on the face of it, as the plaintiff can never obtain possession of the land under it, the court on a suggestion thereof, or upon a *scire*

facias, will order the writ to be vacated, and grant another, and amerce the sheriff. See the form, 1 Towns. Judgm. 129, 130. So where fraud, deceit, or partiality has been practised, if the writ be not filed, the court will stay the filing of it, and grant another writ. 2 Inst. 396. And they will grant another writ in either of the above mentioned instances, whether of defect or fraud, after the first has been filed, according to the opinion of Lord Hale, which seems to be well founded. 1 Vent. 259. *Anon.* See 1 Ld. Raym. 718. *Pullen v. Birbeck*. S. C. 12 Mod. 355. See the form of the return and inquisition,

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Though W. D. has levied part of the sum recovered out of the land, and W. U. has offered to pay him the residue, yet W. D. has refused to receive it.

Scire facias.

And although the said *Walter* hath levied 1489*l.* 16*s.* out of the tenements aforesaid, as manifestly appears by the said extent; and the said Sir *William Underhill* is ready to pay unto the said *Walter* all the residue of the said 1558*l.* that is to say, 68*l.* 4*s.*, yet the said *Walter* hath hitherto altogether refused to receive the said 68*l.* 4*s.* as by the information of the said Sir *William Underhill*, in our court before us, we have been given to understand; therefore we command you, that by good and lawful men of your bailiwick, you make known to the said *Walter*, that he be before us at *Westminster* on *Saturday* next after the octave of *St. Hilary*, to shew if he

Clift. 877. Thes. Brev. 93. Lill. Ent. 574. Tidd's Practical Forms, 347.

It was formerly the practice for the sheriff to deliver *actual* possession of a moiety of the lands; but he now only delivers *legal* possession, and in order to obtain *actual* possession the plaintiff must proceed by ejectment; 3 Term Rep. 295. *Taylor v. Cole*. 2 Tidd's K. B. 960. 2d edit.[e]; in which he must produce a copy of the judgment and of the writ of *elegit*, and of the inquisition and return. Bull. Nisi Pri. 104.[f]

But notwithstanding the statute of Westminster 2. first subjected lands to execution on a judgment, or a recogni-

sance at common law, yet by other statutes lands were made subject to satisfy certain securities created by them; such as statutes-merchant, statutes-staple, and recognisances in nature of a statute-staple.

A statute merchant is a bond of record acknowledged before the mayor of *London*, or chief warden of some other city or town, or other discreet men, chosen and sworn for that purpose, when the mayor or chief warden cannot attend, or before one of the clerks of the statute-merchant nominated by the king pursuant to the statute of Acton Burnell 11 Edw. I. enforced and amended by

[e] But in 6 Taunt. 207. *Rogers v. Pitchers*, Gibbs C. J. was of a contrary opinion. "I am aware," said his lordship, "that in several places it has been said that the tenant in *elegit* cannot obtain possession without an ejectment; but I have always been of a different opinion. There is no case in which a party may maintain ejectment in which he cannot enter." With respect to cases where the land is under a previous demise, his lordship observed, "whatever elder term the sheriff finds, he cannot disturb the previous title of the tenant in possession: all he can do is to put the party who has the *elegit* into the state

"of the landlord: if the land had been in the possession of the former owner, the sheriff might have delivered actual possession: where it is in the possession of a tenant, the sheriff sets it out by metes and bounds, and the tenant is thenceforward bound to pay rent for his moiety to the tenant by *elegit*."

[f] But it has been since held in 2 M. & S. 565. *Ramsbottom v. Buckhurst*, that an examined copy of the judgment roll, containing the award of the *elegit*, and the return of the inquisition, is sufficient: for every part of the record must be taken to speak absolute verity.

has, or knows of any thing to say for himself, why he ought not to receive the said 68*l.* 4*s.* the residue of the damages aforesaid, of and from the said Sir *William*, in full satisfaction and discharge of the said damages, in form aforesaid recovered by the said *Walter* against the said Sir *William*, and why he ought not to be satisfied with the said 68*l.* 4*s.*, and why the tenements aforesaid, heretofore delivered to the

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Why the said
W. D. should
not receive the
residue.

statute 13 Edw. 1. st. 3. *de mercatoribus*. This recognisance is to be entered by the clerk on a roll, which must be double, one part to remain with the mayor or chief warden, and the other with the clerk, who shall write with his own hand an obligation, to which the debtor's seal, together with the seal of the king appointed for that purpose, shall be affixed. Bac. Abr. Execution, 331. The design of this security was to encourage trade, by providing a sure and speedy remedy for merchants, strangers, as well as natives, to recover their debts at the day assigned for payment. Afterward other persons, observing that it was much of the same nature with a judgment, but obtained with infinitely less trouble and expence, frequently entered into this species of contract until by degrees it became a common assurance, as we find it at this day. Ibid. The addition of the king's seal was to authenticate the security, and to make it of so high a nature, that, on failure of payment by the debtor at the day assigned, execution might be awarded without any mesne process to summon him, or the trouble or charge of bringing in proof of the debt. Ibid. If the statute merchant be not made pursuant to the above mentioned statutes in a material part, it is void; and the consor shall be relieved on an *audita querela*; as if it be not sealed with a seal of two pieces; or with the seal of the king and the party, Sir W. Jones, 52. *Maskelyne v. Higford*. S. C. Bridg. 16. 19. Cro. Eliz. 233. *Ascue*

v. Fuljambe. Ibid. 355. *Hollingworth v. Ascue*. 2 Roll. Abr. 466. pl. 2. So the statute merchant is void if it is not made before the mayor of the town, or other officer or clerk appointed to take the statute. Dal. 73. Bridg. 19. Or if it be made before one bailiff, where there are two; for both make but one officer. Winch. 83. 84. Or if it be not inrolled. Winch. 84. Bridg. 19. But the omission of a circumstance not material does not vitiate; as if it does not particularize any day of payment; for then it shall be paid presently. Sir W. Jones, 52. Bridg. 19. Winch. 82. Or where the inrolment and writing is written by the clerk's servant, and not by the clerk himself. Winch. 83. See the form of a statute merchant. Rast. Ent. 594. b. Bridg. 18. But notwithstanding a statute merchant, for want of having a seal of two pieces, &c. be void as a statute, yet it has been held that it is good as a bond, it having the seal of the consor, and may be sued as a bond. Cro. Eliz. 355. *Hollingworth v. Ascue*. S. C. Ibid. 494. 544.

A statute-staple is a bond of record, acknowledged before the mayor of the staple in the presence of the constables of the staple, or one of them, pursuant to statute 27 Edw. 3. c. 9. To this end the statute requires. that there shall be a seal ordained which shall be affixed to all obligations made on such recognizances acknowledged in the staple, and the seal shall remain in the custody of the mayor of the staple under the seals of the constables. Bac. Abr. Execution,

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said *Walter*, ought not to be re-delivered to the said Sir *William*, if it shall seem expedient for him so to do; and further to do and receive what our court before us shall then and there consider of him in this behalf, and have there then the

391, 392. This security was also only designed for the merchants of the staple, and for debts on the sale of merchandises brought there; but in time others began to apply it to their own ends; and the mayor and constables would take recognizances from strangers, surmising it was made for the payment of money for merchandises brought to the staple; to prevent this mischief the parliament by statute 23 H. 8. c. 6. s. 11. reduced the statute-staple to its former channel, and laid a penalty of 40*l.* on the mayor and constables who should extend the benefit of the statute to any but those of the staple. But though that statute deprived them of this benefit, yet it framed a new sort of security, to be used by all persons, known by the name of a recognizance on 23 H. 8. c. 6., or a recognizance *in the nature* of a statute-staple, so called, because this act limits and appoints the same process, execution and advantage in every particular, as is provided for the statute staple. Bac. Abr. Execution, 392.

A recognizance therefore in nature of a statute-staple, as the words of the act declare, is the same with the statute-staple, only acknowledged before other persons; for as the statute runs, the chief justices of the king's bench, and common pleas, or in their absence out of term, the mayor of the staple at *Westminster*, and the recorder of *London* jointly together, shall have power to take recognizances for payment of debts in the form set down by the statute (which see in section 2 of the statute 23 H. 8. c. 6.). In this, as in the former cases, the king appoints a seal to attest the contract, and each of

the justices has the keeping of one such seal, and the mayor of the staple at *Westminster* and recorder, another, of the like print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor and recorder, must be sealed with the seal of the conusor, the king's seal, and the seal of the chief justice, or the seals of the mayor and recorder, before whom it is taken, who are likewise obliged to subscribe their names, sect. 3. Besides which, the clerk of the recognizance, who is appointed for this purpose by the king, or his deputy, is to make and write all obligations thus acknowledged, and enrol them in two several rolls indented, one whereof shall remain with such of the said justices, or with the mayor and recorder, that so shall take the recognizance, and the other with the clerk; who is further obliged, at the request of the conusee, his executors or administrators, to certify such obligations into chancery under his seal, sect. 4, 5. By statute 27 Eliz. c. 4. s. 7, 8. the whole tenor and contents of all statutes merchant and statutes-staple shall, within 6 months after they are acknowledged, be entered in the office of the clerk of recognizances taken according to the 23 H. 8. c. 6. who is to enter the same statutes in a book provided for that purpose, and kept by him; and if they are not brought within 4 months after they are acknowledged to the clerk for the purpose of being so entered, the statutes are made void against subsequent purchasers for money or other good consideration. This statute does not extend to recognizances in the nature of statutes-staple; but by statute 8 Geo. 1.

names of those by whom you shall so make known to him, and this writ. Witness Sir *John Kelynge* knight, at *Westminster*, the 28th day of *November*, in the 20th year of our reign. At which day, before our lord the king at *Westminster*, comes

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c. 25. s. 1. the clerk of the recognizances in the nature of a statute-staple taken under 23 H. 8. shall yearly prepare and keep three parchment rolls as usual, and, at the times of acknowledging every such recognizance, shall write on the said rolls the full tenor in *hæc verba* of every such recognizance: and that one of the rolls shall contain the recognizances taken before the chief justice of the king's bench, another the recognizances taken before the chief justice of the common pleas, and the other the recognizances taken before the mayor and recorder, and at the time of the acknowledgment, the person before whom the recognizance is taken, and the party acknowledging the same, shall sign their respective names to the roll or inrolment of the recognizance under the inrolment, as well as sign and seal the said recognizance; and that the three rolls shall at the end of the year be fixed together, and be made one roll, and remain in the custody of the clerk or his deputy at his public office, who shall keep a docket to refer to the said roll, for the benefit of searches by purchasers and others.

The conusee of a recognizance in nature of a statute-staple may waive the execution given by the 27 Edw. 3. s. 2. c. 9. and use it as an obligation, by bringing an action of debt, the recognizance having the seal of the conusor to it. Bac. Abr. Execution, 394.

By the statute of *Acton Burnel*, 11 Edw. 1. and *de mercatoribus*, 13 Edw. 1. if the debtor does not pay, &c. the creditor shall bring his obligation to the mayor, &c. who shall incontinently cause the moveables of

the debtor to the amount of the debt, to be sold and delivered to the creditor by the appraisement of honest men, and the king's seal shall be put to the sale. And if the mayor find no buyers, he shall deliver the said moveables to the creditor at a reasonable price, &c. And the mayor may cause the body of the debtor (if lay) to be committed to prison, till he agrees to the debt. And if the debtor have no moveables, of which the debt may be levied, or cannot be found within the jurisdiction of the mayor, he shall send the recognizance under the king's seal into chancery, and the chancellor shall direct a writ to the sheriff to seize the moveables, or the body of the debtor (if lay) and make him agree the debt in the same manner as the mayor, if he had been in his power. And by 19 Edw. 1. if the debtor agree not the debt in a quarter of a year by sale of his goods and lands, all his lands and goods shall be delivered to the merchant by reasonable extent to hold till the debt be levied. But by statute 27 Edw. 3. c. 9. the quarter of a year is ousted; and execution shall be on a statute-staple as on a statute-merchant; that is, of the debtor's body and all his lands and goods. And therefore upon a statute-staple or merchant, if execution cannot be made within the staple, the recognizance shall be certified by the mayor into chancery under his seal.

The first process upon a statute-merchant after it is so certified into chancery is a writ of *capias si laicus*, directed to the sheriff, commanding him to take the body of the defendant, if a layman, to satisfy the debt, see the form. F. N. B. 304. 7th edit. E. F. Thes.

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Sheriff returns
scire feci.

the said Sir *William Underhill*, in his proper person, and the sheriff of *Warwickshire* aforesaid, to wit, *Humphry Jennens* esq. returns, that by virtue of the writ aforesaid to him directed, by *Henry Bowers* and *George Bowers*, good and lawful men of his bailiwick, he has given notice to the said

Brev. 56. Lill. Ent. 550. Tidd's Pract. Forms, 358. This writ is returnable either in K. B. or C. B. F. N. B. 304. G. though a *capias* upon a statute-staple is returnable in chancery only. Ibid. 306. If the sheriff returns upon the writ of *capias si laicus* upon a statute-merchant that the party was dead, or not found in his bailiwick, a writ issued to extend the lands, F. N. B. 304. note (a) which also may be made returnable in either bench; and the sheriff may thereupon deliver the lands, &c. to the conusee upon a reasonable extent without the delay or charge of a *liberate*. 1 Vent. 41. Anon. Bac. Abr. Execution, 333. — See the form of the extent, Rast. Ent. 594. b. 595. b. 596. a. 597. a. Thes. Brev. 114. Clift. 869. Lill. Ent. 580. Tidd's Pract. Forms, 359. If the conusor is a clergyman, he cannot be arrested, but the sheriff is commanded to levy the debt of his moveable goods and chattels by a writ of *levari facias*. F. N. B. 304. (A.) 305. 7th edit. See the form F. N. B. 304. (A) Tidd's Pract. Forms, 360. The entry of the writ of extent upon a statute-merchant, with the inquisition returned by the sheriff thereon, may be seen in Co. Ent. 296. a. Ibid. 297. a. a good form, where there is an award on the roll of two writs of extent to two counties, and an inquisition returned by the sheriff of each county. Ibid. 297. b. Clift. 868. Lill. Ent. 551.

But on a statute-staple, or recognition in nature of a statute-staple, if the conusor cannot be found within the

staple, nor his goods to the value of the debt, the first process after the certificate under seal into chancery, is to take body, lands and goods all in one writ; in which respect it is preferable to the statute-merchant, as being a much speedier remedy. Bro. Statute-merchant, 16. Bac. Abr. Execution, 334. See the form of the writ F. N. B. 306. 7th edit. Tidd's Pract. Forms, 360. This writ is returnable into chancery, and the same sort of proceedings are had under it for extending the lands, &c. as upon an *elegit*. But the sheriff after the extent cannot deliver the lands, &c. to the conusee, but must seize them into the king's hands, and in order to obtain possession of them, the conusee must sue out a *liberate*, which is a writ issuing out of chancery, reciting the former writ and return, and commanding the sheriff to deliver to the conusee all the lands, tenements and chattels by him taken into the king's hands, if the conusee will have them, by the extent and appraisement made thereof, until he shall be satisfied his debt. See the form of the writ. F. N. B. 306. 7th edit.; of the writ and return, Rast. Ent. 598. a. b. see 1 Lutw. 429. *Young v. Johnson*. Tidd's Pract. Forms. 361. Upon this writ the sheriff cannot turn the terre-tenant out of possession, as upon an *habere facias possessionem*, but is only to deliver the legal possession as upon an *elegit*, and in order to obtain the actual possession, the conusee must proceed by ejectment. 1 Vent. 41, 42. Anon. [g]

[g] The observations of *Gibbs* C. J., cited ante, 69 a. note [e], seem to apply to this writ.

Walter Devereux, to be before our lord the king, at the day and place aforesaid, to shew in form aforesaid, as the said writ requires and commands: and the said *Walter Devereux*, on the same day being solemnly demanded, by *Ralph Gregge*

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The inquisition ought to find the certainty of the conusor's estate; for if it says that he was *seised* or *possessed* of, &c. it will be insufficient, because no certain estate is found. Dyer. 299. a. *in marg.* So if the death of the conusor is returned by the sheriff, and also an inquisition of extent of the conusor's lands, but in the inquisition no certain estate is found, but generally that the conusor was *seised* on the day of the making of the recognisance of the manor of B., without saying of what estate, the inquisition is void, for *seised* may be for term of life, or in tail, in which case the land is not extendible after his death; therefore as the death of the conusor appears in the return, his *seisin* should be found of a fee simple only. Dyer. 299. a. So if the inquisition finds that the conusor was *seised* of a *tenement* generally of such a value, without shewing any house, land or pasture, it is bad for the uncertainty. Moor, 8. pl. 28.

When a full and perfect execution was had on a statute by an extent returned and filed of record, the conusee was not, in case of an eviction before the debt was satisfied, intitled to a re-extent at common law, any more than we have seen a plaintiff, or a conusee of a recognisance at common law, was; though indeed if the extent had been insufficient in law, there might issue a new extent. Co. Litt. 290. But now this is remedied by the statute 32 H. 8. c. 5. above mentioned. But it was held in Trin. 7 Geo. 1. *Oates v. Robinson*. 1 Str. 461. that after an extent is returned and filed, and there has been no eviction, another extent cannot be sued out into another county, unless the

prayer of such extent into the second county was entered at the time the first extent was taken out. However the conusee was relieved in equity by Lord *Macclesfield*, who gave him leave to enter the prayer *nunc pro tunc*. 2 P. Will. 92. *Oates v. Robinson*. And afterwards the legislature, probably in consequence of the decision in *Oates v. Robinson*, enacted by statute 8 Geo. 1. c. 25. s. 4. "that in case it shall at any time or times, before or after the filing or returning of any liberate or liberates sued out on any extent or extents, upon a recognizance in the nature of a statute-staple, be made appear to the court of chancery, that sufficient has not been extended and levied, or sufficiently extended and levied, to satisfy such recognisance; or that any omission, error, or mistake has happened in making, suing out, executing or returning any of the said writs, or any process thereupon, or it should happen that any lands, tenements, or hereditaments shall be evicted from any person or persons, who shall have extended the same by virtue of any such writ or process as aforesaid; that then and in every such case the said court of chancery shall and may award one or more re-extent or re-extents for the satisfying the same as aforesaid, and that writs of liberate may be sued out thereupon."

But the *lands* of a debtor, or account-ant to the king, were liable to the debt at common law as well as his body and goods. 3 Rep. 12 b. *Harbert's* case. The king's debts are either of record, or not of record; in either case the remedy for the recovery of them

UNDER- his attorney, comes and defends the wrong and injury
HILL V. when, &c. and prays leave to imparl thereto until *Wednesday*
DEVEREUX. next after 15 days of *Easter*, and he has it, &c. The same
day is given to the parties aforesaid there, &c. At which

is by writ of extent, which is either an immediate extent, or an extent in aid of the king's debtor [h]: see the form of each. Tidd, Pract. Forms, 362. 366. Debts of record bind the debtor's land from the time of his becoming in debt to the king. 2 Roll. Abr. 156. (B.) pl. 1. And an execution may be taken out for such debts, although an *elegit* may have been issued at the suit of a subject. Bac. Execution, 365. 2 Roll. Abr. 156, 157. If the king's debt be prior on record, it binds the lands of the debtor into whose hands soever they come, because it is in the nature of an original charge upon the land itself, and therefore must subject every body that claims under it; but if the lands were aliened in whole or in part, as by granting a jointure before the debt was contracted, such alienee claims prior to the charge, and in that case the land is not subject. Bac. Execution, 366.

As to debts not of record they bind the lands from the time they are entered into; which is by force of the statute 33 H. 8. c. 39. s. 50. which enacts "that all obligations and specialties which shall be made for any cause or causes touching or in any wise concerning the king's most royal ma-

"jeaty, or his heirs, or to his or their
"use, commodity or behoof, shall be
"made to his highness and his heirs,
"kings, in his or their name or names
"by the words, *to the lord the king*, and
"to none other person or persons to his
"use, and to be paid to his highness by
"these words, *to be paid to the said*
"*lord the king, his heirs, or executors*,
"with other words used and accustomed
"in common obligations, and that
"all such obligations and specialties so
"to be made, shall be good and effectual
"in the law to all purposes and intents,
"and shall be of the same nature, kind,
"quality, force and effect, to all in-
"tents and purposes, as the writings
"obligatory taken and acknowledged
"according to the statute of the staple
"*at Westminster*." And by sect. 53.
"that all suits, process, judgments,
"decrees and executions hereafter to
"be taken, pursued or given for the
"king in any of the king's courts
"mentioned in that act, of or upon
"any of the obligations shall be of the
"same or like strength, force, effect
"and intent in the law to all purposes,
"only against all and all manner of
"such person or persons as have been
"bound in such obligations or special-

[h] Since the writing of the above note, extents in aid have been greatly restrained by stat. 57 Geo. 3. c. 117. and by rule of the court of exchequer, dated 22d June 1822, as follows: "Upon the motion of Mr. Attorney General, It is ordered, that from henceforth no fiat for an extent in aid shall be granted unless the party applying for the same or some person or persons

on his behalf shall make affidavit that unless the process of extent for the debt due to him from his debtor be forthwith issued, the debt due to the crown from the party applying will be in danger of being lost to the crown."

On the subject of extents in general, upon which the law is by no means settled, see Tidd's Practice, chap. 40. and see West on Extents, *passim*.

day, before our lord the king, comes as well the said Sir *William Underhill*, in his proper person, as the said *Walter*, by his attorney aforesaid. And the said *Walter* (as before) UNDER-
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DEVEREUX. defends the wrong and injury, when, &c. and says, that Plea.

"ties, as well spiritual as temporal,
"and against their heirs, successors,
"executors and administrators, and
"every of them, and against none
"other, as writings obligatory, taken
"and acknowledged according to the
"statute of the staple at *Westminster*
"at any time before the making of
"that act had been used to be taken,
"exercised, and executed against any
"lay person or persons." And by
sect. 74. "if any suit be commenced,
"or taken, or any process be awarded
"for the king, for the recovery of any
"of his debts, then the same suit or
"process shall be preferred before the
"suit of any person or persons. And
"that the king, his heirs and suc-
"cessors, shall have first execution
"against any defendant or defendants
"of and for his said debts before any
"other person or persons, so always that
"the king's suit be taken and commenced
"or process awarded for the said debt at
"the king's suit, before judgment given for
"the said other person or persons." This
statute is held to abridge the old prero-
gative, and to be introductive of a new
law; for the words *so always* that the
king's suits, &c. make a condition pre-
cedent and a limitation. Therefore a
judgment and execution *executed by*
elegit, before any suit or process com-
menced by the king, shall be preferred
to the extent of the king, issuing on a
bond debt bearing date before the sub-
ject's judgment, and assigned to the

king before the subject's execution.
Hard. 23. *Attorney-General v. Andrew*.
In *the King v. Cotton*, Park. Rep. 112.,
it was holden that an immediate extent
against the king's debtor tested *after* a
distress for rent justly due to the land-
lord and notice to the tenant, being
the king's debtor, and *after* appraise-
ment of the goods and chattels, but
before sale, shall prevail against the dis-
tress. And it was further said, that
goods taken in execution, and *remaining*
unsold, are liable to seizure upon an ex-
tent tested after the seizure. However, in
the case of *Uppom v. Sumner*, 2 Black.
Rep. 1251. 1294. it was holden, that
an extent came too late after the de-
fendant's goods were seized in execution
on a judgment at the suit of a subject,
but before sale. And in *Rorke v. Day-*
rell, 4 Term Rep. 402. the same point
was determined. But in the case of
The King v. Pickman, which was argued
in the Exchequer in Michaelmas term
1805, by *Percival* Attorney-General
for the crown, and *Williams* serjeant
for the defendant, after full consider-
ation of all the authorities, the court
decided that goods seized under an ex-
ecution on a judgment at the suit of a
subject are *before sale*, liable to be taken
by virtue of an extent, tested after
the delivery of the *feri facias* to the she-
riff. And they overruled the cases of
Uppom v. Sumner, and *Rorke v. Day-*
rell. [i] A baron's fiat is the true com-
mencement of the king's suit.

[i] See this case of *The King v. Pickman* fully reported by the name of *The King v. Wells & Allnut*, 16 East, 278. in note. The point was again dis-

cussed at great length in three argu-
ments in 16 East, 254., *Thurston v. Mills*, which case however went off
upon another ground, namely, that at all
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the tenements aforesaid, with the appurtenances, so as aforesaid delivered to the said *Walter*, ought not to be re-delivered to the said Sir *William*, because he says, that for a long time after the delivery of the tenements aforesaid, with the appurtenances, in execution for the damages aforesaid, to wit, for two years after the delivery of the said tenements in execution for the damages aforesaid, the said Sir *William* of his own wrong, held the said *Walter* out of the possession of the said tenements with the appurtenances, and he the said Sir *William*, during all that time, took, had, and received the rents, issues, and profits thereof to his own use. And this he is ready to verify. Wherefore he prays judgment, if the said tenements before delivered to the said *Walter*, ought to be re-delivered to the said Sir *William*, &c.

Demurrer.

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And the said Sir *William Underhill* says, that he, by any thing by the said *Walter Devereux* above in pleading alleged, ought not to be prevented or delayed from having a re-delivery of the said tenements; because he says, that the said plea, and the matter in the same contained, are not sufficient in law to bar him the said Sir *William Underhill* from having a re-delivery of the said tenements to which he the said Sir *William Underhill* has no necessity, nor is he bound by the law of the land in any manner to answer. And this he is ready to verify. Wherefore for want of a sufficient plea in this behalf, he the said Sir *William* prays judgment, and that the said tenements may be re-delivered to the said Sir *William Underhill*.

Joinder.

And the said *Walter Devereux* says, that the plea aforesaid by him the said *Walter Devereux*, in manner and form aforesaid pleaded, and the matter in the same contained, are good and sufficient in law to bar the said Sir *William Underhill* from having a re-delivery of the said tenements; which said plea and the matter in the same contained, he the said *Walter*

events the plaintiff cannot maintain an action for money had and received to his use against the sheriff, who sells under the extent and pays the proceeds to the crown. The court of exchequer afterwards adhered to *The King v. Wells & Allnutt, dubitante* Wood B. in 6 Price, 114. *The King v. Sloper & Allen*. But where the sheriff sold part of the goods seized under a *feri facias* on a Saturday

and part on the following Monday and received the money from the purchasers before the delivery to him of an extent tested on the Monday, the court of C. B. held that an action for money had and received would lie against him at the suit of the plaintiff in the *feri facias*. 1 Brod. & Bing. 370. *Swain v. Morland*. 3 B. Moore, 740. S. C.

Devereux is ready to verify and prove, as the court, &c. And because the said Sir *William* does not answer the said plea, nor has hitherto in anywise denied the same, he the said *Walter*, as before, prays judgment if the said tenements ought to be re-delivered to the said Sir *William Underhill*, &c. But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day thereof is given to the parties aforesaid, before our lord the king at *Westminster*, until *Friday* next after the morrow of the *Holy Trinity*, to hear their judgment of and upon the premises, for that the court of our said lord the king now here is thereof not yet, &c.

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Continuance.

Case 10.

Underhill versus Devereux.

Pasch. 21st of King *Charles* the 2d. Roll. 558.

SCIRE Facias(4) by *Underhill* knight, against *Devereux*, that whereas the defendant had recovered against the plaintiff in this court 1558 $\frac{1}{2}$. for damages and costs in an action of assault and battery, and afterwards, to wit, on the 30th day of *May*, in the 14th year of the reign of the now king, the defendant had sued out an *elegit* upon the said recovery, returnable on *Thursday* next after three weeks of *St. Michael*, whereby the sheriff of *Warwickshire*, on the 13th of *October* in the 14th year aforesaid, had delivered to the defendant divers lands and tenements for a moiety, at a certain yearly value, as by the record appears; and although the defendant

S. C. 2 Keb. 345. If the party himself hold out the tenant by *elegit* from the tenements extended, the tenant by *elegit* may hold over, but if a stranger holds out the tenant by *elegit*, he cannot hold over; but is put to his action of trespass against the stranger.

(4) A *scire facias* is a judicial writ, founded on some matter of record, as a recognizance either at common law or by statute, judgment, letters patent, and the like, to enforce the execution of them, or to vacate and set them aside. And, as the defendant may plead thereto, it is, as we have already shewn, considered in law as an action, and in the nature of a new original. *Skin.* 682. *Woodyeer v. Gresham.* S. C. Comb. 455. See ante, p. 6. note (1), *Jefferson v. Morton*. Therefore to authorise the plaintiff's attorney to sue out a *scire facias*, he must have a new warrant;

Cro. Eliz. 177. *Hird v. Burstowe.* 2 Ld. Raym. 1048. *Treviban v. Lawrence*; for although any one may pray a *scire facias* for the plaintiff, yet judgment upon it can only be prayed for by attorney, and consequently, if no warrant of attorney be entered on the record, it is error; 2 Ld. Raym. 1252. *Atwood v. Burr.* S. C. 1 Salk. 89. 2 Salk. 603.; and because it is a new action, there is no necessity for an order to change the attorney in the former suit. 7 Term Rep. 337. *Bachelor v. Ellis*. So where a judgment was entered for securing the payment of an annuity granted before the

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has levied 1489*l.* 16*s.* out of the tenements aforesaid, as by the extent aforesaid manifestly appears, and he (the plaintiff) is ready to pay all the residue of the said 1558*l.*, that is to say, 68*l.* 4*s.* to the said *Walter* (the defendant), yet the said

statute 17 Geo. 3. c. 26., which enacts, "that before any execution shall be sued out or action brought, on any such judgment already entered, a memorial of the deed, bond, instrument, &c. shall be enrolled in chancery," a *scire facias*, issued after the act to revive the judgment, was set aside, for want of such a memorial, because it was an action upon the judgment, and therefore within the statute. 1 Term Rep. 267, 268. *Fenner v. Evans*. It has however been adjudged that a writ of error does not lie into the exchequer chamber on a judgment given in the king's bench on a *scire facias*, but only into parliament; the statute 27 Eliz. c. 8. s. 2. which gives the writ of error into the exchequer chamber, mentioning only actions of debt, detinue, covenant, account, actions upon the case, *ejectione firmæ*, or trespass. Cro. Car. 286. *Nevill v. South*. Ibid. 300. *Lancaster v. Keyleigh*. Ibid. 464. *Anon.* 1 Roll. Rep. 264. *Harvey v. Williams*. 1 Vent. 38. *Wingate v. Stanton*. 1 Salk. 263. *Hartol v. Holt*. S.C. 1 Ld. Raym. 97. post, 101 c.

However a *scire facias* upon a judgment is to some purposes only a continuation of the former suit, although upon a *recognizance* it is always an original proceeding; as where the defendant's attorney, after the plaintiff had obtained an interlocutory judgment and executed a writ of inquiry, agreed that no writ of error should be brought, and the defendant dying before the return of the writ, a *scire facias* issued against his executors to recover the damages against them, upon which they brought a writ of error;

the court held that, inasmuch as the *scire facias* was in this case not a new action, but only a continuation of the old one, and brought merely to revive the former judgment, the executors were bound by the agreement of the testator's attorney; and as the testator himself, if he had lived, could not have brought a writ of error, neither could his executors; therefore the court ordered the testator's attorney to *nonpros* the writ of error. 1 Term Rep. 388. *Wright v. Nutt*. [k]

So if a bill of exceptions be sealed by a judge, and he dies, a *scire facias* lies against his executors or administrators to certify it. 2 Inst. 428. And if a sheriff return that he has levied the debt under a *feri facias*, and has the money ready, but retains it in his hands, a *scire facias* lies against him to have execution of it. Hutt. 32. *Smith v. Livesey*. So if the sheriff return that he seised goods under a *feri facias* to a certain value, and sold part of them, but the rest remained unsold for want of buyers, and were afterwards rescued, a *scire facias* lies against him to have execution to the whole value returned; for as the return of the rescue is not a good one in law, and the sheriff has admitted that he seised goods to that value, he is answerable to the plaintiff to the whole amount of it. Cro. Jac. 514. *Sly v. Finch*. Post, 343. *Mildmay v. Smith*. But if the sheriff had only returned, that the goods remained in his hands for want of buyers, a *scire facias* would not lie, but either a *venditioni exponas*, if the sheriff be still in office, or a *distringas nuper vicecomitem*

[k] 8 Taunt. 434. *Baddeley v. Shafto*, acc.

defendant has hitherto altogether refused to receive the said 68*l.* 4*s.* as from the information, &c., therefore you make known to the said defendant to shew wherefore he ought not to receive the said 68*l.* 4*s.*, the residue of the said damages

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If he be out of office. Ibid. So if the sheriff return an *elongavit* to a writ of *retorno habendo* in replevin either by plaint or writ, and removed into K. B. or C. B., a *scire facias* lies on the judgment of *retorno habendo* against the pledges, to shew cause why their goods to the value of the goods replevied and delivered to the plaintiff, should not be delivered to the defendant. 3 Mod. 56. *Dorrington v. Edwin*. S. C. Comber. 1. Skinn. 244. 2 Show. 421. 485. S. P. Fort. 330. *Mulso v. Shere*. See the form of the *scire facias*, Rast. Ent. 569. b. Thes. Brev. 274, 275. See also 1 Saund. 195 a. b. note (3).

The best way perhaps to explain the nature of a *scire facias*, will be to consider it, 1. when it is brought upon a recognizance acknowledged to secure the payment of a debt, or to do some other act; 2. upon a recognizance entered into by bail; 3. upon a judgment; and 4. upon letters patent. And first as to a recognizance to secure the payment of a debt; it is to be observed, that a recognizance is an obligation acknowledged either before some court of record, or before any one of the judges of *Westminster Hall* in term, or out of term, and in any part of *England*, or before the lord chancellor or keeper, or by the custom of the city of *London*, before the mayor and aldermen, or the mayor singly, or before special commissioners appointed by the king, and afterwards entered of record: for it is not a perfect record until it be enrolled in some court of record. Bac. Abr. Execution, 390. See *Jeffreson v. Morton*, ante, 8. i. note (5.) If the conusee or conusor, die within a year after the acknowledgment of a recognizance, it is necessary to sue out a *scire facias* in or-

der to have execution upon it. 2 Inst. 471. 395. So if the conusee did not take out execution within a year after the day of payment assigned in the recognizance, he was obliged at common law to commence an action of debt upon the recognizance, for the law presumed the debt was paid; see ante, 6. *Jeffreson v. Morton*, note (1); but now by the statute *Westminster 2.* (13 Edw. 1.) St. 1. c. 45. the conusee may sue out a *scire facias*, to revive the recognizance and put it in execution, if the conusor cannot stay it by pleading such matters as the law judges sufficient for that end. 2 Inst. 469. F. N. B. 595, 596, 597. 7th edit. Statutes-merchant, and recognizances in the nature of a statute-staple, seem to have an advantage over recognizances at common law in this respect; for it is holden that the conusees of those statutes may sue out execution at any time without a *scire facias*; or if the conusee die, his executor may sue out execution without a *scire facias*; so if the conusor be returned dead by the sheriff, execution it seems may either be taken out against his lands without a *scire facias* against his heir, or the conusee may sue it out against the heir and terre-tenants at his election. 2 Inst. 471. 395. Bro. Statute-merchant, 16. 48. 50. Bac. Abr. Execution, 395. *Scire facias*, 413.

So if a man acknowledge a recognizance at common law to be paid at a day within a year after, the conusee may have execution by *feri facias* or *elegit* within a year after the day of payment without a *scire facias*, though the year be past from the date of the recognizance. 1 Roll. Abr. 899. (O.) pl. 2. 2 Inst. 471.

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from the said plaintiff, in full satisfaction and discharge of the said damages in form aforesaid recovered by the said defendant against the said plaintiff, and why he ought not to be satisfied with the said 68*l.* 4*s.*, and the tenements, here-

If two persons acknowledge a recognizance jointly and severally, the conusee may sue out several writs of *scire facias* against the conusors. 2 Inst. 395. And if the sum be made payable by the recognizance at three several days, the conusee, after the first day of payment is elapsed, may have execution for the sum then due immediately, and for the other sums as they respectively become due, without waiting for the last day of payment; and this holds as well on recognizances at common law, as by statute; of which the reason seems to be because they are in the nature of three several judgments. Co. Litt. 292. b. 2 Inst. 395.

2. We will in the second place consider the recognizance which is entered into by bail; and that is either in an action, or upon a writ of error; and first, as to the recognizance by bail in an action. If the action is in the common pleas, the recognizance is taken in a penalty or sum certain, being double the amount of the sum sworn to, and contains a condition, that if the defendant be condemned in the action, he shall pay the condemnation money, or render himself a prisoner to the *Fleet*, or the bail will pay the money for him. Formerly the bail might enter into the recognizance jointly with the defendant, who was bound in double the amount of the sum sworn to, and the bail in the single sum; but now by a rule of that court, the defendant is not permitted to enter into the recogni-

zance at all, but each of the bail must enter into a recognizance in double the sum sworn to. 1 Bos. & Pull. 530. But if the action is by bill, the recognizance of the bail is general, that if the defendant shall be condemned in the action, he shall satisfy the costs and condemnation money, or render himself to the custody of the marshal, or that the bail will satisfy them for him. Cro. Jac. 645. *Appesley v. Ive*. Cro. Car. 482. *South v. Griffith*. 2 Salk. 564. *Shuttle v. Wood*. See the form of the recognizance in C. P. Sell. Prac. 139. and in K. B. Tidd's Prac. Forms. 94. [7] But the court will not permit the plaintiff to levy, out of the penalty of the recognizance, equitable costs, which he had been really put to, but were not included in the judgment. 2 Str. 826. *Baldwin v. Morgan*.

If the principal, after judgment against him, does neither pay the condemnation money, nor surrender himself to prison, a *scire facias* lies against the bail. 2 Lutw. 1269. *Sparks v. Cole*. 1279. *Baxter v. Peach*; but it seems to be clearly settled, that no proceedings, either by *scire facias*, or action of debt, can be had against the bail upon their recognizance, before a *capias ad satisfaciendum* is taken out against the principal, and returned *non est inventus*; for the bail are not bound to render the principal, until they know, by the plaintiff's suing out the writ of *capias ad satisfaciendum*, that he means to proceed against the person of the de-

[7] In the K. B. by original, the recognizance is taken in a sum certain, being double the sum sworn to, unless that sum exceed 1000*l.* and then in the

sum sworn to, and 1000*l.* beyond. 13 East, 62.; the same rule is now adopted in C. B. 3 Taunt. 341. And in the exchequer. Wightwick, 115.

tofore delivered to the said defendant, ought not to be restored to the said plaintiff, if, &c. And upon this writ the sheriff returned a *scire feci*, and the defendant appeared and pleaded in bar, that the plaintiff for a long time, to wit, for two

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defendant. Sir W. Jones, 29. *Sparrow v. Sowgate*. Ibid. 138. *Calf v. Dingley*. Cro. Car. 481. *South v. Gryffith*. Sty. 281. *Barcock v. Thompson*. Ibid. 288. 323. S. C. 2 Lutw. 1273. *Sparks v. Cole*. 1 Ld. Raym. 156. *Wilmore v. Clerk*. 10 Mod. 267. *Weddall v. Jocar*. [m] No attempt is in truth ever made to find out the principal in order to arrest him on the *capias ad satisfaciendum*, but it is left at the sheriff's office merely to give the bail notice that the plaintiff intends to proceed against the defendant's person: and therefore it is the duty of the bail to search in the sheriff's office to know whether any *capias ad satisfaciendum* is left there. 3 Burr. 3960. *Hunt v. Coxe*. [n] But if the *capias ad satisfaciendum* be regularly sued out and returned, it may be filed at any time, the filing being mere matter of form. 1 Lev. 225. *Gee v. Fane*. 3 Burr. 1360. *Hunt v. Coxe*. 1 Black. Rep. 393. S. C. So that if the principal dies after the return of the *capias ad satisfaciendum*, and before the return is filed, the bail are fixed, and

the court will not stay the filing of the return. 6 Term Rep. 284. *Rawlinson v. Gunston*.

So where the principal dies after the return of the *capias ad satisfaciendum*, and before taking out a writ of *scire facias* against the bail, the writ may be sued out afterwards, and the court will not stay the proceedings. 2 Str. 717. *Barry v. Barry*. S. C. 2 Ld. Raym. 1452. Or if he dies between the return of the *capias ad satisfaciendum*, and the return of the second *scire facias*, the bail are liable. 1 Str. 511. *Glyn v. Yates*.

So the bail are liable, though the plaintiff takes a *cognovit* from the principal, without giving any notice thereof to them. 5 Term Rep. 277. *Hodgson v. Nugent*. [o] But if the plaintiff declares against the defendant for a different cause of action from that mentioned in the writ, as where the writ is against the defendant as *acceptor of a bill of exchange*, and the declaration is in covenant, 2 H. Blac. 278. *De la Cour v. Read*; or from that mentioned in the

[m] And where a *ca. sa.* was returned *non est inventus*, and proceedings had against the bail, who rendered the defendant in time, and the defendant was afterwards bailed out again, it was held that the plaintiff could not proceed against the fresh bail without a fresh *ca. sa.* 1 B. & A. 212. *Thackray v. Harris*. The court at the same time intimated a doubt whether the defendant was entitled to be bailed the second time.

[n] The sheriff's return of *non est inventus* is good, though the plaintiff knew where to find the defendant. Tidd,

1128. citing *Sillitoe v. Wallace*, MS. But if the defendant be already in custody of the sheriff, he cannot return *non est inventus*, Ibid. citing 1 N. R. 251. *Forsyth v. Marriott*. 16 East, 2. *Burks v. Maine*. 2 M. & S. 238. *Ward v. Brumfit*.

[o] Unless by the *cognovit* time be given to the principal beyond that at which the plaintiff would have been entitled to judgment and execution, if he had proceeded to trial, in which case the bail are discharged. 4 Taunt. 456. *Botsfield v. Tower*. 5 Taunt. 319. *Croft v. Johnson*. 1 Marsh. 59. S. C. 15 East, 617. *Thomas v. Young*.

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years after the delivery of the said tenements in execution for the damages aforesaid, of his own wrong held the said defendant out of the possession of the said tenement with the appurtenances, and the said plaintiff for the whole time

affidavit to hold to bail, as where the affidavit is for money had and received by three defendants and another who is dead, and the declaration is for money had and received by the three defendants only; 6 Term Rep. 363. *Spalding v. Mure*; or where the affidavit is in *assumpsit*, and the plaintiff declares in *trover*. 7 Term Rep. 80. *Tetherington v. Golding*; [p] or where the plaintiff sues by *original writ* in one county, and declares in a different county, 3 Lev. 235. *Yates v. Plaitin*; in these cases the bail are discharged. So, where the cause is referred to arbitration, the bail are discharged, unless a verdict be taken for the plaintiff; and therefore in that case an inquiry should always be made whether there are bail to the action or not. [q]

The *capias ad satisfaciendum* against the principal should be directed to the sheriff of the county where the action was laid; and where the proceedings are by bill, there must be eight days, or if by original, 15 days, between the *teste* and return of the writ. 1 Salk. 602. *Ball v. Russel*. S. C. 2 Ld. Raym. 1177. there being a proviso in the statute 13 Car. 2. St. 2. c. 2. s. 7. (which dispenses with the necessity of having 15 days between the *teste* and return of a writ of *capias ad satisfaciendum*) that the act shall not extend to a writ of *capias ad satisfaciendum* against the defendant in order to make bail liable. And in order to charge the bail it must lie 4 days exclusive in the sheriff's office. 2 Salk. 599. *Anon.* [r] and be made returnable, like the former

[m] So where the declaration contains causes of action in addition to those stated in the affidavit, the liability of the bail is confined to the latter. 7 Taunt. 304. *Wheelwright v. Jutting*.

[q] The bail are also discharged, wherever the plaintiff gives time to or makes any composition with the defendant without their knowledge and concurrence. 7 Taunt. 53. *Willison v. Whittaker*. 2 Marsh. 383. S. C. 8 Taunt. 28. *Thackeray v. Turner*. 1 B. Moore, 457. S. C. But if the plaintiff in making his agreement with the defendant expressly reserves to himself a right to proceed at any time against the defendant, notwithstanding his having taken securities, the bail are not thereby discharged, 7 Taunt. 126. *McNeill v. Glendinning*, and see 5 Taunt. 614. *Brickwood v. Anniss*. The principle of these deci-

sions is thus stated by Gibbs C. J., in 7 Taunt. 126. "The courts of law have held, with respect to bail, that the bail are entitled to surrender the principal at any time, whenever the plaintiff himself would not be precluded from proceeding against him. If the creditor gives time to the principal, the creditor cannot during that time proceed against him; neither during the same can the bail, who are therefore discharged." In what cases the bail will be relieved on the bankruptcy of the defendant. See Tidd, 311.

[r] These must be the last four days exclusive of the day when it is lodged, and also of the return day. 13 East, 588. *Cock v. Brockhurst*; and Sunday is not reckoned even where it is an intervening day. 1 B. & A. 528. *Howard v. Smith*.

aforesaid took, received and had, the rents, issues and profits thereof to his own use, and this, &c. wherefore, &c. upon which the plaintiff demurs in law.

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And *Powys* serjeant, for the plaintiff, took an exception to

proceedings, on a day certain, or general return day.

The recognizance being forfeited upon the return of *non est inventus* to the *capias ad satisfaciendum*, the plaintiff may proceed against the bail by *scire facias*, or action of debt. The plaintiff is at liberty to bring either one action of debt against all the persons bound in the recognizance, or several actions against each of them; but one *scire facias* is sufficient: because the recognizance upon which the *scire facias* is founded, being joint and several, and the purport of it being to have execution according to the form and effect of the recognizance, it therefore follows that although the *scire facias* be joint, the execution may be several. 1 Lev. 225, 226. *Gee v. Fane*. S. C. 1 Sid. 339. Bac. Abr. Execution, 359.

Before an action is commenced, or *scire facias* sued out, against the bail upon the recognizance, the bail-piece ought regularly to be filed, and an entry made of the recognizance on a roll, which shall be carried in and docketed. However, it is sufficient if it be done at any time before the bail are called upon to plead, for otherwise they may plead *nul tiel* record; and if the recognizance-roll be not carried in until afterwards, it seems they may withdraw their plea, and the plaintiff shall pay the costs of it. In the common pleas, and also in the K. B. when

the proceeding is by original, the filazer enters the recognizance and docket it; but when the proceeding is by bill, the recognizance is entered by the plaintiff's attorney after the declaration, with a memorandum of the term it is of. See the form of entry in each case, Tidd's Pract. Forms, 99, 100, 101, 102. 2 Sell. 45, 46.

The *scire facias* must issue out of the court in which the action was depending; see the form of it in the common pleas. 2 Rich. Prac. C. P. 404. 415. 5th edit. and in the king's bench. Thes. Brev. 229. Tidd's Pract. Forms, 394. 396. 398. There is a difference between a recognizance, which is in the nature of a judgment and a bond: if a *scire facias* be brought against two persons only as bail, upon a recognizance acknowledged by them and the principal jointly and severally, it will be bad on demurrer, and the writ shall abate, because, being founded upon a record, the plaintiff ought to set forth the cause of the variance from the record, as that the principal was dead. [s] But if an action be brought upon a joint and several bond against two only, where there are three or more obligors, the defendants ought to plead in abatement that it was made by them and others in full life not named in the writ; for the court will not intend that the bond was sealed and delivered by all that are named in it; [f] and therefore

[s] This can no longer happen, as above mentioned, since the defendant does not now join in the recognizance: but it may happen where there are three or more bail: and the rule is the same in the case of other recognizances.

2 Anst. 448. *Rex v. Young*, where the same distinction respecting bonds was noticed; and 3 Anst. 811. *Rex v. Chapman*.

[f] Nor that all that are named in it are alive. 1 Saund. 291 f. n. (f.)

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the plea, because the defendant says, that the plaintiff, for two years after the delivery of the tenements in execution, &c. held out the defendant, but does not say that the holding out was for two years next after the delivery, &c. as he

the defendants cannot demur upon it, though it be entered in *hæc verba*. All. 21. *Blackwell v. Ashton*. See 1 Saund. 291. *Cubell v. Vaughan*, note (1).

Although a recognizance of bail be taken actually by a judge of the K. B. at his chambers in Serjeants' Inn, yet the course of the K. B. is to enter it *as taken in court*, the recognizance not being obligatory in that court by the caption, but by its being entered of record; therefore in the K. B. a *scire-facias* or action of debt, must be brought in *Middlesex* where the record is, and not elsewhere; [u] but in the C. B. the recognizance is a record immediately upon the caption by a judge of the C. B. at his chambers, and binds the lands of the consors before it is filed at *Westminster*; and when filed it is a record in court, and a *scire facias* or debt lies upon it, either in *Middlesex* where it is filed, or in *London*, where it was taken. [v] And if the declaration in *scire facias*, or debt, state that the recognizance was taken in the court of C. B., and upon *nul tiel record* pleaded, the recognizance certified appear to have been taken by one of the judges of the C. B. at his chambers, and afterwards delivered by him into court to be enrolled, it is a fatal variance, and a failure of the record. 2 Salk. 564. *Shuttle v. Wood*. S. C. Ibid. 600. 659. 6 Mod. 42. Hob. 195. *Hall v. Winckfield*. S. C. 1 Brownl. 69. Sty. 9. *Andrew's case*. S. C. All. 12. 2 Lutw. 1287. *Redman v. Idle*. 2 Black. Rep. 768. *Kenny v. Thornton*. And such variance cannot be

amended after the defendant has pleaded *nul tiel record*, for there may be a recognizance that agrees with it. 1 Salk. 52. *Buckson v. Hoskins*. See the proper form of declaring in a *scire facias* upon a recognizance taken before a judge at chambers. Brownl. Rediv. 433.

Next as to the recognizance by bail on a writ of error: by statute 3 Jac. 1. c. 8. the plaintiff in the writ of error must be bound, with two sufficient sureties, to the person for whom the judgment is given, by recognizance in double the sum adjudged to be recovered by the former judgment, to prosecute a writ of error with effect, and also to satisfy and pay, if the judgment be affirmed, all and singular the debts, damages and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of execution. Post, 101 i. See the form of the entry of recognizance of bail on error from the king's bench to the exchequer chamber. Tidd's Pract. Forms, 477. Therefore if the judgment be affirmed, or the plaintiff do not prosecute the writ, and in consequence thereof it be nonprossed or discontinued, the defendant in error may sue the bail upon their recognizance either by action of debt, or *scire facias*, at his election. The writ of *scire facias* is made out by the clerk of the errors, and on a recognizance taken in the K. B. the writ recites not only the recognizance, but the condition of it, and the affirmance of the judgment; see the form of the writ, Tidd's Pract. Forms, 400.; but on a recognizance taken in

[u] 5 East, 461. *Coxeter v. Burke*.
2 Smith, 14. S. C.

[v] 2 B. Moore, 66. *Hartley v. Hodson*.

ought, for perhaps the holding out was after the purchase of the plaintiff's writ, and then it is nothing to the purpose.

Kelynge chief justice answered, that it appears by the plaintiff's own shewing, that all the monies were not levied at the

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the C. B., the *scire facias* only states the recognizance, and the non-payment of the sum acknowledged to be due; see the form of the last mentioned writ, Tidd's Pract. Forms, 399. for in that court the condition of the recognizance in error is not incorporated, as it is in a recognizance of bail on a *capias ad respondendum*, but is subscribed by way of defeasance, so that the recognizance and condition are two distinct records. Barnes, 95. *Malland v. Jenkins*, 339. *Crosse v. Porter*. Besides which, if the condition were stated, it would also be necessary to state the affirmance of the judgment, which might occasion a difficulty, if the bail should plead *nul tiel record* of the judgment of affirmance, which remains in the king's bench. Tidd's Prac. K. B. 1022. 2d edit.

In this case a render will not excuse the bail, therefore there is no occasion to sue out a *capias ad satisfaciendum* in order to proceed against them. The *scire facias* against the bail in error must be brought in the court where the recognizance was taken, unless it was taken in the common pleas, and then the *scire facias* may be brought either there, or in the king's bench to which the record is removed; a *certiorari* lying to remove the recognizance of bail in error to the king's bench, after the judgment is affirmed there. 4 Mod. 104. *Barisdale v. Drew*. 1 Show. 343. Comb. 199. S. C. The form of the *scire facias* when brought in the king's bench may be seen in Lill. Ent. 343. [w]

3. As to a *scire facias* upon a judgment; and that is either by or against

the same, or different parties. This writ is given by the statute of Westminster 2. (13 Edw. 1.) c. 45. to the plaintiff in a personal action to revive the judgment, where he has omitted to sue out execution within a year after judgment obtained; see ante, p. 6. *Jefferson v. Morton*, note (1). It is now settled that a *scire facias* lies on a judgment in *ejectment*, for the words of the statute above-mentioned are "*vel alia quæcumque irrotulata*," which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a real action at common law. 2 Salk. 600. *Proctor v. Johnson*. Bac. Abr. Execution, 362. The reason why the plaintiff is put to his *scire facias* after the year, is, because where he lies by so long after his judgment, it shall be presumed that the judgment is executed, or that the plaintiff has released the execution, and therefore the defendant is not to be disturbed without being called upon, and having an opportunity of pleading that the judgment is executed, or the release, or shewing other cause, if he can, why execution should not issue against him. Ibid. The year must be computed from the day of signing judgment; Barnes, 197. *Sympton v. Gray*; and is to be reckoned by calendar months, and not by terms. 1 Str. 301. *Winter v. Lightbound*.

But although the general rule be, that the plaintiff cannot take out execution after the year without a *scire facias*, yet the rule must be understood with some qualification; for if the defendant

[w] As to other points respecting bail in error. See post, 101.

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time the writ was purchased, and it also appears that the writ had been pending only a year; therefore the holding out was at least a year before the purchasing of the writ, and so there was no cause for the plaintiff to have restitution.

brings a writ of error, and thereby hinders the plaintiff from taking out execution within the year, and the plaintiff in error is nonsuited, or the writ of error abated or discontinued, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *scire facias*; because the writ of error was a *supersedeas* to the execution, and the defendant in error must wait until it be determined. 2 Inst. 471. 5 Rep. 88. *Garnon's case*. Cro. Eliz. 416. *Goodwin v. Grudge*. 1 Roll. Abr. 899. (N.) pl. 9. Carth. 237. *Howard v. Pitt*. 6 Mod. 288. *Booth v. Booth*. S. C. 1 Salk. 322. Lane, 20. *Dennis v. Drake*. Bac. Abr. Execution, 362. And if the year had expired *before* the writ of error was sued out, and the judgment is affirmed, or the plaintiff in error is nonsuited, or the writ of error is discontinued, the plaintiff may sue out execution without a *scire facias*, for the writ of error revived the judgment. Cro. Jac. 364. *Bellasis v. Hanford*. S. C. 1 Roll. Rep. 104. 1 Roll. Abr. 899. (N.) pl. 3, 4, 5. Lane, 20. 1 Show. 402, 403. *Howard v. Pitt*.

So if the plaintiff has judgment with a *cesset executio*, or stay of execution for a year, he may after the year take out his execution without a *scire facias*, because the delay is by consent of parties, and in favour of the defendant. 6 Mod. 288. *Booth v. Booth*. S. C. 1 Salk. 322. Bac. Abr. Execution, 362. It was formerly holden, that if the plaintiff had

been tied up by injunction out of chancery for a year, he could not take out execution without a *scire facias*, because courts of law do not take notice of chancery injunctions as they do of writs of error, 6 Mod. 288. 1 Salk. 322. Bac. Abr. Execution, 363. 1 Str. 301. *Winter v. Lighthouse*; but it has been since decided, that if the plaintiff has been prevented from suing out execution within the year by the defendant's obtaining an injunction out of chancery, he may sue out execution afterwards without a *scire facias*. 2 Burr. 660. *Michel v. Cue*. So where a *feri facias*, or *capias ad satisfaciendum*, is taken out within the year, and not executed, a new writ of execution may be sued out at any time afterward without a *scire facias*, provided the first writ be returned and filed, and continuances entered from the time of issuing it: see ante 68. continuation of note (1). And the continuances may be entered after the issuing of the second writ, unless a rule be made upon motion for the proceedings to remain *in statu quo*. Tidd's Prac. 1028. 2d edit. [x] If the judgment be under seven years old, the plaintiff may sue out a *scire facias* as a matter of course without any rule, or motion; if it be above seven years, but under ten, he cannot have a *scire facias* without a side-bar rule; 2 Salk. 598. *Hardisty v. Barny*; but if it be above ten years old, but under twenty, there must be a motion under counsel's hand, supported by an affidavit, that the judgment

[x] It was formerly held that an *elegit* might be sued out after a year without any *scire facias*; but in a recent case, the court of K. B. held that there

was no distinction between *elegits* and other writs. *Putland v. Putland*. Tidd, 1136. MS.

Saunders, for the defendant, took an exception to the record, because the plaintiff in his writ says, *he was ready to pay* the residue of the money not levied, but he has not brought any money into court to tender to the defendant as he ought, and the entry of it should have been after the return of the writ in this manner: "And thereupon the plaintiff brings here into court the said 68*l.* 4*s.* ready to be paid to the defendant, if he will receive the same," &c. but it not being so, the defendant will lose these monies

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Qu. Whether it was sufficient for the plaintiff to say that he was ready to pay the residue of the money, without tendering it in court?

is unsatisfied: and if the judgment be of more than 20 years' standing, there must be a rule to shew cause on a similar affidavit. Tidd's Prac. 404. note(g), and 1031. 2d edit.[y] The *scire facias* must be sued out of the same court where the judgment was given if the record remains there; Com. Dig. Pleader (3 L. 3.); or if it be removed, then out of the court where the record is. See the form of a *scire facias* upon a judgment after a year, Thes. Brev. 224. Tidd's Prac. Forms, 418, 419, 420, 421. This being a judicial writ, must pursue the nature of the judgment; therefore if a joint judgment be obtained against two, the *scire facias* must be against both. 2 Salk. 598. *Panton v. Hall*. S. C. Carth. 105.

If the judgment of an inferior court is removed into the king's bench by *certiorari*, or by writ of error, it must appear in the writ of *scire facias* upon such judgment, how it came into the king's bench; for if it came in by *certiorari*, the *scire facias* ought to shew the particular limits of the inferior jurisdiction, and pray execution within those

limits. But if the judgment be removed into the king's bench by writ of error and affirmed, the party may have execution in any part of *England*, for by the affirmation it is become the judgment of the king's bench. 1 Ld. Raym. 216. *Guliam v. Hardy*. S. P. 1 Lev. 134. *Herbert v. Alcocke*. If, after the judgment has been revived by *scire facias*, the plaintiff do not take out execution within a year, or the defendant die before execution, the plaintiff must sue out a new *scire facias*, but may have it without motion, for the judgment was revived before. 2 Salk. 598. *Hardisty v. Barny*. Tidd's Prac. 1034.

In debt on bond conditioned for the payment of money by instalments, where the proceedings are stayed on payment of one or more of the instalments, judgment is entered as a security for the remainder with a stay of execution till they become due; and in such case there seems to be no necessity for a *scire facias*, if execution be taken out within a year after each default. 2 Str. 957. *Darby v. Wilkins*. S. P. 2 Black. Rep. 706. *Marsen v. Touchet*. [z]

[y] See Tidd, 1138. 7th edit., in which the time is said to have been altered to *fifteen* years.

[z] In the case of *Darby v. Wilkins*, the court proceeded upon the equity of the stat. 4 Ann. c. 16. s. 13.; but now since it has been decided (6 East, 550. *Willoughby v. Swinton*) that a bond

conditioned for the payment of money by instalments is within the stat. 8 & 9 W. 3, no application under the stat. of Ann. will in such case be entertained by the court, but the plaintiff has his judgment under the stat. of William, and must have a *scire facias* to recover future instalments. The case of *Marsen*

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which, by the plaintiff's own shewing, were due to him and not levied, if judgment shall be given for the plaintiff upon this record; and for this fault of the plaintiff, in not tendering the money in court, he said, the plaintiff cannot have judg-

Where judgment is entered in an action of debt on bond, or on any penal sum, for non-performance of covenants or agreements contained in any indenture, deed or writing, we have already observed (see 1 Saund. 58. *Gainsford v. Griffith*, note (1).) that by the statute 8 & 9 W. 3. c. 11. s. 8. it remains as a security to answer such damages as shall or may be sustained by a further breach of any covenant contained in the same indenture, deed, or writing; and the plaintiff may have a *scire facias* upon the judgment, suggesting other breaches of the said covenants or agreements. See the form of the *scire facias*, Tidd's Prac. Forms, 430.

By statute 5 Geo. 2. c. 30. s. 9. it is enacted, "that in case any commission of bankruptcy shall issue against any person or persons who shall have been discharged by virtue of that act, or shall have compounded with his, her, or their creditors [a], or delivered to them his, her or their estate or effects, and been released by them, or been discharged by any act for the relief

"of insolvent debtors, then and in either of those cases, the body and bodies only of such person and persons conforming as therein mentioned shall be free from arrest and imprisonment by virtue of that act; but the future estate and effects of every such person and persons shall remain liable to his, her, or their creditors, as before the making of that act, (the tools of trade, the necessary household goods and furniture, and necessary wearing apparel of such bankrupt and his wife and children only excepted) unless the estate of such person or persons, against whom such commission shall be awarded, shall produce clear of all charges, sufficient to pay every creditor under the said commission, fifteen shillings in the pound for their respective debts." Although a prior commission has been superseded by consent, yet a second bankruptcy does not protect future effects, unless fifteen shillings in the pound are paid under the second commission. Doug. 46. *Thornton v. Dallas*. [b]

v. *Touchet* was not one of a bond for payment of money by instalments, but for payment of a gross sum at a future day, and interest in the mean time; as to which see ante, Vol. II. p. 48. (note). And in such a case, where default had been made in payment of the interest, the principal not being due, the court would not stay proceedings on payment of the interest and costs; but intimated that they would restrain the execution, if the plaintiff should levy more than was fit. 2 Taunt. 387. *Tighe v. Crafter*. 1 B. & A. 214. *Vansandau v. —*

[a] Although some of the creditors

do not come in under the composition, 1 M. & S. 182. *Slaughter v. Cheyne*; unless the composition be limited to a particular class of creditors. 15 East, 619. *Norton v. Shakespeare*.

[b] It lies on the bankrupt pleading his certificate where he comes within the provisions of this clause of the act, to prove affirmatively that his estate has produced sufficient to pay 15s. in the pound; evidence that it probably will do so is not sufficient. 16 East, 225. *Coverly v. Morley*. 3 Esp. 195. *Gregory v. Merten*.

ment if the plea had been bad. (5) But the court did not pay much regard to this objection, but for the reason of the chief justice they held the plea good; wherefore it was adjudged for the defendant.

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If judgment be obtained against a bankrupt before he has had his certificate under the second commission, it is a general one; but if given afterwards it may be special against his future estate and effects with the exception of his tools of trade, necessary household goods, &c. as mentioned in the statute. The plaintiff cannot, on a *general* judgment, sue out a *special* execution against the future effects of the bankrupt, for the execution must follow the judgment, and be warranted by it; 1 Term Rep. 80. *Buxton v. Mardin*; but must proceed by *scire facias*. That writ must state the judgment, and the circumstances which make the defendant's future estate and effects liable to satisfy it; as that he was before a bankrupt, or had compounded with his creditors, &c. and particularly it is necessary to aver, that the bankrupt's estate had not paid fifteen shillings in the pound under the second commission at the time of suing out the writ of *scire facias*; for the words of the act, "that the future estate and effects of such person shall be liable to his creditors unless the estate shall produce sufficient to pay fifteen shillings in the pound, &c." being in the enacting clause it has been holden, that the *scire facias* must negative that exception; according to the distinction taken by Treby C. J. in *Jones v. Azen*, 1 Ld. Raym. 120., who says, "the difference is, that where an exception is incorporated in the body of the clause, he who pleads the clause, ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause,

"and leave it to the adversary to shew the proviso." 7 Term Rep. 27. *Gill v. Scrivens*. 1 Saund. 238. (note). The *scire facias* must then state that the defendant has become seised or possessed of some estate or effects, and commands the sheriff that he make known to the defendant to appear in court at the return day, to shew cause why the plaintiff should not have execution of the debt or damages, to be levied of the estate and effects, whereof the defendant has become seised or possessed, since the obtaining of his certificate under the last commission, except his tools, &c. Ibid.

By the lords' act, 32 Geo. 2. c. 28. s. 20. it is provided, that "notwithstanding any discharge obtained by virtue of that act for the person of any such prisoner, the judgment obtained against every such prisoner shall continue and remain in force, and execution may at any time be taken out thereon against the lands, tenements, rents or hereditaments, goods or chattles of any such prisoner, other than and except the necessary wearing apparel and bedding for himself and family, and the necessary tools for the use of his trade or occupation, not exceeding 10*l.* in value in the whole, as if he had never been before arrested, taken in execution and released out of prison by virtue of that act."

In like manner, and for the same reason, it has been holden that no *special* execution can be taken out on a *general* judgment obtained against a defendant, before his discharge under an insolvent act, without first suing out a *scire facias*, 1 Term Rep. 80. *Buxton v. Mardin*; in which case it was adjudged, that a war-

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Note; There was no question about the matter of law, namely, that, if the party himself holds out the tenant by *elegit* from the tenements extended, the tenant by *elegit* may hold over: but otherwise, if a stranger holds out the tenant

rant of attorney to confess a judgment having been given before an insolvent act was made, which the defendant was intitled to plead in discharge of his person, &c. a *general* judgment signed under such warrant of attorney after the defendant's discharge did not warrant a *special* execution under the act, for the execution must follow the judgment; but the plaintiff must bring a *scire facias*. And it has been determined, that the effects acquired by an insolvent after his discharge under statute 34 Geo. 3. c. 69. are not protected by the 31st section of that statute, which exempts only the persons of such as are discharged under it from imprisonment for prior debts, but leaves the *effects* which they acquired after their discharge liable to be taken in execution for a debt due before. 6 Term Rep. 366. *Spalton v. Moorhouse*. [c]

In the next place, let us consider the writ of *scire facias* on a judgment by or against different parties.

We have already observed (ante, 6. *Jeffreson v. Morton*, note (1),) that the rule in this case is, that where a new person, who was not a party to a judgment, derives a benefit by, or becomes chargeable to the execution of it, there must be a *scire facias* to make him a party to the judgment, 1 Ld. Raym. 245. *Penoyer v. Brace*. S.C. 1 Salk.

319, 320. 2 Ld. Raym. 768. *Queen v. Ford*. 2 Inst. 471. On this rule are founded the cases of survivorship, marriage, bankruptcy and death; and first of survivorship.

At the common law in all actions, where there are two or more plaintiffs or demandants, the death of one of them pending the suit, that is, before final judgment, is an abatement of the action, though the property survives to the other, except in a few cases, such as in a *quare impedit* by two, where out of necessity the death of one does not abate the suit, for the six months may pass, or a lapse incur, before the survivor can bring another action, and therefore, if the writ abates, the action will fail; or in an *audita querela* by two, for it is only in discharge; or in debt by two executors, where one was summoned and severed, and dies, the writ does not abate. 10 Rep. 194. *Read and Readman's case*. Cro. Jac. 19. *Leigh v. Brown*. 2 Lev. 82. *Dacres v. Dunkin*. S. C. 1 Vent. 235. Sir T. Raym. 463. *Wedgewood v. Baily*. 3 Mod. 249. *Capel v. Sakonsal*; and the case of *Spring v. Barrett*, 2 Buls. 262., to the contrary, was denied in Sir T. Raym. 463. So where there are two or more tenants, or defendants, the death of one of them, pending the action, abates the suit. Bro. Brief. 295.

[c] By the last Insolvent Debtors' Act, which is in force until 1825, the defendant may plead his discharge in bar of any action for a debt due before, and the only mode of proceeding against his future effects is by application to the Insolvent Debtors' Court

established under that act, to whom power is given to cause a judgment against the prisoner to be entered up in any of the superior courts at *Westminster*, and to order execution to be taken out at their discretion. See 1 Geo. 4. c. 119.

by *elegit*; for there the tenant by *elegit* shall not hold over against the reversioner, but is put to his action of trespass against the stranger, as fully appears in Sir *Andrew Corbet's* * case. (6)

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Cro. Car. 574, 583, 589. *The King v. Dryden*. 1 Show. 56. *Dove v. Martin*. 1 Leon. 44. *Knight's case*. Plow. 186. b. *Woodward v. Lord Darcey*. Sir T. Raym. 131. *Worral v. Brand*. S. C. 1 Lev. 165. 1 Sid. 259. But the action does not abate by the death of one of the tenants, or defendants, when the other has the whole by survivorship. Cro. Car. 574. *The King v. Dryden*. Hard. 113. *Young v. Woolaston*. Nor where the action is founded on a *tort*, as in trespass, ejectment, trover, conspiracy, and the like, against two, and one dies, though they are charged jointly. Bro. Brief. 80. Yelv. 209. *Spencer v. Rutland*. 2 Lev. 82. Sir T. Raym. 131. 463. Cro. Eliz. 145. *Hill v. Tempest*. Cro. Jac. 19. Moor, 469. *Griffin v. Lawrence*. Cro. Jac. 356. *Rigley v. Lee*. Hard. 161. *Harris v. Phillips*. Cro. Eliz. 625. *Bennison v. Watson*. But even where the action is founded on a *tort*, as in trespass, if one of the defendants was dead at the time of the commencement of the suit, the writ shall abate, because it was always false. Bro. Brief. 175. Hard. 114. *Young v. Woolaston*. But now by statute 8 & 9 W. 3. c. 11. s. 7. it is enacted, "that if there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants." In this case, if the death hap-

pen before issue joined, it should be suggested in making up the issue, but otherwise it is not necessary to suggest it till the plea roll is made up. 1 Burr. 362. *Far v. Denn*. And where one of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both, the plaintiff was permitted, even after a motion to set aside the proceedings for this irregularity, to suggest the death of the other on the roll, and to amend the *capias ad satisfaciendum*, without paying costs; 5 Term Rep. 577. *Newnham v. Law*. But as no new person is introduced, there is no occasion in these cases to revive the judgment. Tidd's Prac. 1047.

If one of several defendants dies after judgment, and before execution, it was formerly holden, that a *scire facias* must be brought against the personal representative of the deceased. Yelv. 208. *Spencer v. Rutland*. But this case is denied to be law by Lord Holt, Comb. 441. *Pennoyer v. Brace*. Afterwards it was determined that, where it is necessary to revive the judgment, before the plaintiff can take out execution, a *scire facias* would lie against the survivor alone, reciting the death, and that he could not plead that the *heir* of the deceased had assets by descent, and pray judgment if he ought to be charged alone; for at common law the charge upon the judgment being personal survives; (see ante, 50. the case of *Norton and Harvey*, cited in *Trethewy v. Ackland*.) And the statute of *Westminster 2*. which gives an *elegit*, does not take away the privilege of the plaintiff, but he may still have execution at the common law, if he pleases: but if he

should, after the allowance of this writ, and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by suggestion, or else by *audita querelâ*, or perhaps upon motion. Sir T. Raym. 26. *Edsar v. Smart*. S. C. 1 Lev. 30. and S. C. cited Carth. 106. *Panton v. Hall*. 3 Bac. Abr. 698. 4 Bac. Abr. 419; see ante, 51. note (4). But it seems clear that where there are two or more plaintiffs or defendants in a personal action, and one or more of them die after judgment, execution by *fi: fa:* or *ca: sa:* may be had within the year for or against the survivors without a *scire facias*. Moor, 367. *Isam's case*. 1 Ld. Raym. 244. *Pennyroyer v. Brace*. S. C. 1 Salk. 319. Carth. 404. Comb. 441. 5 Mod. 338. 1 Show. 402. *Howard v. Pitt*. 7 Mod. 68. *Withers v. Harris*. S. P. But the execution must agree with the judgment, and therefore the execution must be sued out in the joint names of all the plaintiffs, or defendants, otherwise it will not be warranted by the judgment. 1 Ld. Raym. 244. *Pennyroyer v. Brace*. S. C. 1 Salk. 319. Although the execution on a joint judgment must be joint, yet it may be levied upon one only, and he may have contribution against the others. 5 Term Rep. 556. *Herries v. Jamieson*. Bro. Execution, 10.

Next of marriage. If a *feme sole* obtain judgment, or if a judgment be recovered against her, and she marry before execution, a *scire facias* must be brought by or against husband and wife, in order to execute the judgment. See the form of the *scire facias* by husband and wife, Tidd's Pract. Forms,

499. 2 Rich. Prac. C. P. 402. *Thesl* Brev. 256. 265. Clift. 681.; and against husband and wife. Tidd's Pract. Forms, 440. *Thes. Brev.* 247. 251. It is not necessary to lay a venue where the marriage was solemnized, it being a matter of surmise, to which no venue is necessary. 2 Str. 775. *Blake v. Dode-mead*. S. C. 2 Ld. Raym. 1504. If a verdict be found on a plea of coverture for the wife, who has been sued as a *feme sole*, it has been determined, that it is irregular to sue out execution for the costs, in the name of husband and wife, without a *scire facias*; but the wife may take out execution in her own name, because the plaintiff, having declared against her as sole, is concluded from denying it. Dougl. 637. *Wortley v. Rayner*. [d]

If husband and wife obtain judgment for a debt due to the wife before marriage, and the wife die before execution, the husband alone may have a *scire facias* without taking out administration; or may, it seems sue out execution in the name of himself and wife without a *scire facias*, for the nature of the debt is altered by the judgment, and it is become a debt due to the husband. Cro. Eliz. 844. *Butler v. Delt*. 1 Sid. 337. *Eyres v. Coward*. 1 Mod. 179. *Miles's case*. Cro. Car. 208. *Bea-mond v. Long*. 3 Mod. 189. *Obrian v. Ram*. 4 Bac. Abr. 420. If judgment be recovered by a *feme sole*, and she marry, and then the husband and wife sue out a *scire facias* upon the judgment, and have an award of execution, and afterwards the wife die, the husband alone may have a *scire facias* to

[d] If interlocutory judgment be obtained against a *feme sole* on a contract, and she marry before final judgment, the plaintiff may proceed to final judgment and execution against the wife without a *scire facias*. 4 East, 521.

Cooper v. Hanchin. So in ejectment against a *feme sole* who marries before verdict, the plaintiff may proceed to judgment and issue an *habere facias possessionem*, without a *scire facias*. 3 M. & S. 557. *Doe v. Butcher*.

execute the judgment. 1 Salk. 116. *Woodyer v. Gresham*. S. C. Skin. 642. Comb. 455. Carth. 415.

And in like manner if a *scire facias* is brought against husband and wife upon a judgment recovered against her when sole, and execution is awarded thereon against both; and afterwards the wife dies, a *scire facias* may be sued out against the husband after her death to have execution of the judgment against him. 3 Mod. 186. *Obrian v. Ram*. S. C. Carth. 40. Comb. 103. S. C. cited Comb. 455. 1 Salk. 116. Skin. 683. 4 Bac. Abr. 420. But if husband and wife recover judgment for a debt due to the wife as executrix, and the wife die, the husband shall not have a *scire facias* upon the judgment, but the succeeding executor or administrator. Cro. Car. 208. 227. *Beamond v. Long*. Sir W. Jones, 248. S. C.

So if a man obtain interlocutory judgment and become a *bankrupt* before final judgment, his assignees may proceed to final judgment in his name, and then sue out a *scire facias* in their own name to have execution. 2 Wils. 372. *Hewit v. Mantell*. [e] So if a man recover final judgment, upon which the defendant brings a writ of error, and the plaintiff become a bankrupt pending the writ of error, his assignees ought to proceed to an affirmance of the judgment in the bankrupt's name, and then sue out a *scire facias* in their own names upon the judgment to have execution. 1 Term Rep. 463. *Kretchman v. Beyer*. 2 Term Rep. 45. *Winter v. Kretchman*. 1 Mod. 93. *Monks v. Morris*. 1 Vent. 193. S. C. 2 Wils. 372. 378. *Hewit v. Mantell*. However, where the plaintiff became a bankrupt between

interlocutory and final judgment, and took out execution in his own name, though regularly the assignees ought to have brought a *scire facias* on the final judgment, and have sued out execution in their own names, yet the court refused to interfere to set aside the proceedings. 3 Term Rep. 437. *Waugh v. Austen*. And it is sufficient if the *scire facias* by the assignees states generally that he became a bankrupt within the true intent and meaning of the statutes, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs, without alleging that the party was declared a bankrupt, or his effects assigned by deed. 2 Term Rep. 45. *Winter v. Kretchman*. See the form of the writ. Tidd's Pract. Forms, 440.

And lastly as to *death*: which may be considered either as it happens before, or after final judgment. At common law the death of the plaintiff or defendant, at any time before *final* judgment, would have abated the suit. But now by statute 17 Car. 2. c. 8. s. 1. it is enacted, that "in all actions "personal, real or mixt, the death of "either party *between the verdict and* "the judgment, shall not be alleged "for error, so as such judgment be "entered within two terms after such "verdict." It is holden, that the death of either party *before* the assizes is not remedied; but if the party die *after the assizes begin*, though the *trial* be after his death, it is within the remedy of the statute; for the assizes are but one day in law, and this is a remedial law and shall be construed favourably. 1 Salk. 8. *Anon*. 7 Term Rep. 32. note (a). And in like manner

[e] But wherever the defendant has an opportunity he may plead the bankruptcy of the plaintiff, and an assignment of his effects; 15 East, 622. *Kinnaird v. Tarrant*; but it is not sufficient

to show that he has committed an act of bankruptcy not followed up by a commission. 2 T. R. 479. *Foster v. Allanson*.

and for the like reason it was adjudged, that if the defendant die after the first day of the *sittings*, and before the trial, it is remedied. 7 Term Rep. 31. *Jacobs v. Miniconi*. The judgment upon this statute is entered by or against the party, as if he were living; 1 Salk. 42. *Weston v. James*; and it should be entered, or at least signed, within two terms after the verdict; for signing the judgment is an entering of it within the statute; 1 Sid. 385. *Helie v. Baker*. Barnes, 261. *Webb v. Spurrell*; but there can be no execution without a *scire facias* to revive the judgment. 1 Wils. 302. *Earl v. Brown*. And as the judgment is general against the party, as if he were living at the time it was entered, so the *scire facias* must follow the judgment, and recite it as if it had been entered in his life time; or in other words, the *scire facias* must be in the usual form the writ is conceived in, when brought by or against the personal representatives of a person against whom a judgment has been obtained. 2 Ld. Raym. 1280. *Colebeck v. Peck*. See 1 Lev. 277. *Burnett v. Holden*.

By a subsequent statute, 8 & 9 W. 3. c. 11. s. 6. it is enacted, "that in all actions to be commenced in any court of record, if the plaintiff or defendant happen to die, after interlocutory and before final judgment, the action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by or against the executors or administrators of the party dying [f]; but the plaintiff, or if he

" be dead after such interlocutory judgment, his executors or administrators, shall and may have a *scire facias* against the defendant, if living after such interlocutory judgment, or if he died after, then against his executors or administrators, to shew cause why damages in such action should not be assessed and recovered by him or them; and if such defendant, his executors or administrators, shall appear at the return of such writ, and not shew or allege any matter sufficient to arrest the final judgment, or being returned warned, or upon two writs of *scire facias*, it be returned, that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county, shall make default, that thereupon a writ of inquiry of damages shall be awarded, which being executed and returned, judgment final shall be given for the plaintiff, his executors or administrators, prosecuting such writ or writs of *scire facias* against such defendant, his executors or administrators, respectively." See the form of the *scire facias*, where one of the parties dies after interlocutory judgment, and before the issuing of a writ of inquiry. Tidd's Pract. Forms, 441; and where the death happens after the issuing, and before the execution of the inquiry, Clift. 680. Lill. Ent. 647. 1 Rich. Prac. C. P. 386. 5th edit. Tidd's Pract. Forms, 442. Imp. C. P. 528. 4th edit.; and where the death happens after the

[f] Therefore in 4 Taunt. 884. *Ireland v. Champneys*, it was held that an action for a libel abated by the death of the plaintiff, after interlocutory judgment, and after the execution of a writ of enquiry, but before the day in bank. And where the plaintiff sued two defendants, against one of whom he proceeded to outlawry, and the other died

after interlocutory and before final judgment, it was held that the plaintiff could not proceed on this statute against the executors of the deceased, for notwithstanding the outlawry the action remained joint and survived against the other defendant. 1 M. & S. 242. *Fort v. Oliver*.

execution, and before the return of the inquiry, Imp. C. P. 527. 4th edit. Tidd's Pract. Forms, 444.; and for the form of final judgment thereon, see Tidd's Pract. Forms, 461. If the party dies before interlocutory judgment, it is a case not within the statute; and therefore it will be irregular to sign interlocutory judgment after, and proceed upon the statute. 1 Wils. 315. *Wallop v. Irwin*.

Where the death of either party happens after interlocutory judgment, and before the execution of the writ of inquiry, the form of the *scire facias* ought to be for the defendant, or his executors, or administrators, to shew cause why the damages should not be assessed and recovered against them. 1 Salk. 315. *Smith v. Harmon*. Lill. Ent. 647. 1 Rich. Prac. C. P. 386. Tidd's Pract. Forms, 444. Imp. C. P. 528. Imp. K. B. 391. 4th edit. though the form in Clift. 680. is to shew cause why the plaintiff should not recover his damages, &c. and to hear the judgment of the court thereupon. 6 Mod. 144. *Smith v. Harmon*. And where the party dies after the execution of the writ of inquiry, but before the return of it, the *scire facias* must be to shew cause why the damages assessed by the jury should not be adjudged to the plaintiff, or his executors or administrators. 1 Wils. 243. *Goldsworthy v. Southcott*. See ante, 6. note (2), and 1 Term Rep. 388. *Wright v. Nutt*.

The final judgment upon the writ of inquiry, after interlocutory judgment revived by *scire facias* under the statute 8 and 9 W. 3., must be against the executor or administrator, and not against the testator or intestate himself, as it is upon the statute 17 Car. 2.; and therefore it cannot be pleaded as a judgment against the testator or intestate. 1 Salk. 42. *Weston v. James*. And where the defendant dies after

interlocutory and before final judgment, the plaintiff must sue out two writs of *scire facias* to entitle himself to take out execution; one before final judgment to make the executors or administrators parties to the record; the other after final judgment, to give them the opportunity of pleading the want of assets, or any other matter, that an executor may plead in his defence to a *scire facias* brought upon a final judgment obtained against his testator; for it would be unreasonable that the executors or administrators should be in a worse situation, where their testator or intestate died before final judgment, than they would have been in, if he had died after. Say. Rep. 266. *Tomkins v. Gratton*.

We have already observed, ante, 6. note (1), that if either plaintiff or defendant die after final judgment and before execution, a *scire facias* must be sued out by or against his executors or administrators, or, if the defendant die, against his heir and terre tenants. If any of the executors are *feme covert*s, their husbands must be made parties to the *scire facias*. And though an executor or administrator become bankrupt, he may still proceed by *scire facias*, as the bankruptcy does not affect his representative character. A *scire facias* may be sued out either by or against the executor of an executor who has proved the will, for he is executor of the first testator: but an administrator of the executor does not represent the testator; nor does the executor or administrator of an administrator represent the first intestate. Therefore a *scire facias* cannot be sued out by or against either of them to revive the judgment, 5 Rep. 9 b.; but in that case there must be taken out administration *de bonis non*, as it is called, that is, of such goods as are left unadministered by the executor or administrator.

If a judgment be recovered against an executor who dies intestate, a *scire facias* will lie upon the judgment against the administrator *de bonis non* of the testator, for he comes in the place of the testator, and being for a debt of the testator, is liable; but an administrator *de bonis non* could not have a *scire facias* upon a judgment obtained by the executor of the testator, but was put to his action; for he comes paramount the judgment, and is no party thereto. Cro. Car. 167. *Snape v. Norgate*. S. C. 1 Roll. Abr. 890. (T.) pl. 3. Sir W. Jones, 214. But now by statute 17 Car. 2. c. 8. s. 2. "Where any judgment after a verdict shall be had, by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment." In the construction of this statute it has been holden, that since an administrator *de bonis non* may by virtue of the act commence an execution (that is, by *scire facias*) on a judgment obtained by an executor or administrator, it is within the equity of the act, that he may perfect an execution already begun by the executor or administrator, for the right now comes to him. 1 Salk. 923. *Clerk v. Withers*. But still, if an executor brings a *scire facias* on a judgment, or recognizance, and has judgment *quod habeat executionem*, and dies intestate, the administrator *de bonis non* must bring a *scire facias* upon the original judgment, and cannot proceed upon the judgment in the *scire facias*. 2 Ld. Raym. 1049. *Treviban v. Lawrence*. See the form of a *scire facias* for or against an executor or administrator to revive a judgment obtained by or against the testator or intestate. Co. Ent. 617. a. 618. b. Lill. Ent. 638, 639, 640. 645. 659. Thes. Brev. 228. 240, 241. 250. 252. 1 Rich. Prac. C. P. 378, 379, 380. 2 Rich. Prac. C. P.

400. Imp. C. P. 517, 518. 4th edit. Imp. K. B. 385, 386. 4th edit. Tidd's Pract. Forms, 447, 448, 449.

Where a judgment is had against one who dies before execution, it is said that a *scire facias* will not lie against his heir and terre-tenants, until a *nil* is returned to a *scire facias* against his personal representatives. Carth. 107. *Panton v. Hall*; but when *nil* is returned, the plaintiff may have a *scire facias* against the heir of the defendant, either alone, or jointly with the tenants of the lands, whereof the defendant was seised at the time of the judgment, or at any time after. See ante, p. 7. note (4), p. 8. notes (8), (9).

In a *scire facias* against the terre-tenants, if the heir and others are returned terre-tenants, the defendants cannot object that a *scire facias* should first issue against the heir, before the writ should issue against them as terre-tenants. Cro. Eliz. 896. Sir C. Heydon's case. S. C. Co. Ent. 619. But it seems to be the better opinion, that the terre-tenants alone are not to be charged, until the heir be summoned, or that it be returned that there is no heir, or that the heir has not any lands to be charged; for the heir may have a release to plead, or other matter to bar the execution. Bac. Ab. *Scire facias*. 418.; see ante, p. 8. note (8).

Where there are several defendants, and one of them dies before execution, since the charge upon the judgment survives as to the personalty, though not to the realty, as we have already shewn, the plaintiff may have a *scire facias* framed upon the special matter, namely, against the survivor, to shew cause why the plaintiff should not have execution against him of his goods and chattels, and of the moiety of his lands, and against the heir and terre-tenants of the deceased, to shew why the plaintiff should not have execution of a moiety

of the lands of the deceased without mentioning any goods. Carth. 107. *Panton v. Hall*, per *Holt C. J.*

There is another writ of *scire facias* against the terre-tenants upon a writ of error to reverse a fine or recovery; but this writ is said by Lord *Holt* to be discretionary, and not *stricti juris*, but yet to have been the constant and usual course of the court, and therefore not to be departed from. See the form of the award of it, post, 92, 93. in the case of a recovery, and Co. Ent. 233. b. in the case of a fine. And the terre-tenants can only plead a release of errors, to defend their own possession, or for the sake of purchasers; but they cannot plead in abatement of the writ, because they are not parties to the suit. Carth. 111. *The Earl of Pembroke's case*. S. C. Skin. 273. S. P. 1 Burr. 359, 360. *Hall v. Woodcock*. And there is no necessity in such case for a *scire facias* against the heir. 1 Burr. 412. *Sheepshanks v. Lucas*.

4. With respect to a *scire facias* to repeal letters patent. If the king by his letters patent grants the same thing to two persons, the first patentee may have a *scire facias* to repeal the second patent. 4 Inst. 88. Dy. 197. b. 198. a. 2 Roll. Abr. 191. (U.) pl. 2.; but the second patentee cannot bring a *scire facias*, though the better right should be in him. Dy. 276. b. 277. a. So if the king's grant be founded upon a fraud or a false suggestion, he may have a *scire facias* to repeal it. 4 Inst. 88. Bro. Patent, 14. Petition, 11. 11 Rep. 74. b. *Magdalen College case*. 2 Roll. Abr. 191. (T.) As if the patent recites another to have an office, who had in truth forfeited it, and grants it when it shall happen to be vacant after the death, surrender, &c. of that other, Dy. 197. b.; but no *scire facias* can be sued out in this case until the king's attorney general grants his fiat to take it out. So if

the king grants any thing which by law he cannot grant, he, *jure regio*, for the advancement of justice and right, may have a *scire facias* to repeal his own letters patent. 4 Inst. 88. But if the patent be void in itself, it is said that *non concessit* may be pleaded to it, without a *scire facias* to repeal it. 2 Roll. Abr. 191. (S.) pl. 2. So if an officer makes a forfeiture of his office, the king may have a *scire facias* to repeal his patent. Dy. 197. b. 198. a. 210, 211.

Where a patent is granted to the prejudice of another, he may have a *scire facias* to repeal it at the king's suit; as if a market, fair, &c. be granted to the annoyance and prejudice of an ancient market or fair of another. Dy. 276. b. 3 Lev. 220. *Rex v. Sir Oliver Butler*. S. C. 2 Vent. 344. And in this case the king of right is to permit the person prejudiced by the patent, upon his petition, to use his name for the repeal of it, in a *scire facias* at the king's suit, to prevent multiplicity of actions upon the case, which will lie notwithstanding such void patent. 2 Vent. 344. And indeed it has been holden, that the person prejudiced by the patent may, upon the enrolment of it in chancery, have a *scire facias* to repeal it as well as the king. 6 Mod. 229. *Brewster v. Weld*.

A *scire facias* for repealing a patent may be sued in the petty bag in Chancery, for it is a record there. 4 Inst. 88. 3 Lev. 223. So it may be in the king's bench. 4 Inst. 72. If the writ alleges matter by the words "whereas we are given to understand and be informed," it is well enough, for they are sufficient to put the party to answer. 3 Lev. 222.

A *scire facias* by the king to repeal a patent upon a forfeiture of office, ought to set forth the cause of forfeiture, Dy. 198. b.; but it is not necessary

to do so in a *scire facias* by a former patentee. Ibid.

Judgment on a *scire facias* to repeal a patent may be by confession; or, by default, if the defendant be returned warned, or upon two *nihils*. Dy. 197. b. 198. a. 2 Roll. Abr. 192. (X.) pl. 1. So the defendant may demur to a *scire facias* if the matter alleged be not sufficient to repeal the patent. 3 Lev. 221. *Rex v. Sir Oliver Butler*. And if on a *scire facias* to repeal a market it be found, that the *grant* was to the prejudice of another, it is sufficient, though it is not found that the *user* was prejudicial. 1 Str. 43. *Rex v. Eyre*. The judgment in a *scire facias* for repealing a patent is "that the said letters patent of our said lord the king be revoked, cancelled, vacated, annulled, void and invalid, and be altogether had and held for nothing, and also that the inrolment thereof be cancelled, quashed and annulled." 4 Inst. 88. Dy. 197. b.; see the form of a *scire facias* to repeal a patent. Lill. Ent. 411. See the form of the memorial to his Majesty for a *scire facias*, and his Majesty's warrant to the attorney-general to sue it out, the attorney-general's *fiat*, and the writ of *scire facias* thereon. 2 Rich. Prac. C. P. 391—398. [g]

A *scire facias* to revive a judgment by or against the parties, or their personal representatives, must be brought in the county where the original action was laid. Hob. 4. *Musgrave v. Wharton*. S. C. Cro. Jac. 331., and see Yelv. 218. S. C. But upon a return of *nihil* against the personal representatives, the plaintiff may have a *testatum scire facias* against the heir and terre-tenants in another county. Cro. Car. 313. *Eyres v. Taunton*. Carth. 105. *Panton v. Hall*.

It is said that a *scire facias* is not

amendable; as where in a *scire facias* on a judgment, the plaintiff's name was by mistake put for the defendant's, namely *Ralph* instead of *James*; and it was moved that it should be amended, it being the fault of the clerk; but the motion was denied, for the writ does not appear to be wrong, and there may be such a judgment. 1 Salk. 52. *Vavasor v. Baile*. However, both Lord Holt and Lord Treby were of opinion, that the fault of the clerk, such as *John* for *Thomas* was amendable. 1 Ld. Raym. 183. 548. *Villers v. Parry*. And in *Brewster v. Wills*, cited 2 Ld. Raym. 160. a *scire facias* out of the petty bag returnable into K. B. was amended, and *Sping* a man's name was amended into *Spring* by the instructions given to the clerk of the petty bag. So where a *scire facias* recited a judgment of the 3d year of Queen *Anne* instead of the *first* year, it was amended and made the *first* agreeable to the record, 2 Ld. Raym. 1060.; but in both these cases the amendment was made immediately upon the return of the *scire facias*, before any plea pleaded. Ibid. But if there be a variance in the *scire facias* from the judgment, and the defendant has pleaded *nul tiel* record, the writ it seems is not amendable. 2 Ld. Raym. 1057. *Bucksome v. Hoskin*. S. C. 6 Mod. 263. 310. 1 Salk. 52. S. P. 2 Str. 892. *Baynes v. Forrest*. 1165. *Grey v. Jefferson*. So if it be defective in the *return* or *teste*, it is not amendable. 1 Str. 401. *Hillier v. Frost*. And in *Barnes*, 26, 27. *Hodgson v. Michell*, it is said that the court in some instances refuses leave to amend writs of *scire facias* against *bail*, when, by the amendment, the bail may be deprived of the advantage of surrendering the principal, as perhaps they might do in case of a faulty *scire*

[g] The prosecutor is not entitled to costs, as the 8 & 9 W. 3. c. 11. s. 3.

does not extend to this case. 7 T. R. 367. *The King v. Miles*.

facias quashed, and a new one sued out. [h]

Where the sheriff returns *scire feci*, generally speaking the defendant has been previously served with a copy of the sheriff's warrant, which recites the writ of *scire facias*: or at least some notice of the proceedings must have been given him, the sufficiency of which, if disputed, must be determined by the court on the circumstances. 2 Black. Rep. 837. *Wright v. Page*. And in general where the sheriff returns *scire feci*, the court will not inquire into the validity of the summons on motion, but leave the party to his action against the sheriff for a false return. 2 Str. 813. *Barr v. Satchwell*. 3 Burr. 1360, 1361. *Hunt v. Coxe*. S. C. 1 Black. Rep. 393.

The sheriff, on the return of the *scire facias*, either returns *scire feci*, or *nihil*, that is, that he has given notice to the defendant, or that he has nothing by which he can make known to him; see the form of the return, Thes. Brev. 227. 263. 228. 273., Tidd's Pract. Forms, 455. But to a *scire facias* against the heir and terre-tenants, the sheriff returns, either that there are none, or that he has warned them to appear; in the latter case, if the writ be general against the terre-tenants without naming them, the sheriff should return that he has warned certain persons, describing them, being tenants of all the lands in his bailiwick, or certain persons tenants of certain lands, and that there are no other; See the form, Co. Ent. 622. a. Herne, 327. Dalt. Sher. 559. Thes. Brev. 269. 96. 279. 288. Lill. Ent. 385, 386. Carth. 105. *Panton v. Hall*. 2 Salk.

598. S. C.; see the return of *nihil* against an heir and terre-tenants, or against them severally. Thes. Brev. 253. 271. 283. Lill. Ent. 385. Tidd's Pract. Forms, 457. and of *nihil* as to the heir, and *scire feci* to the terre-tenants of one defendant, and *nihil* as to the heir and terre-tenants of another, Tidd's Pract. Forms, 457.

Where the sheriff returns *nihil*, the plaintiff must sue out a second or *alias* writ of *scire facias*, commanding the sheriff as *before* he was commanded, &c. 4 Inst. 472. Cro. Jac. 59. *Randpl v. Wale*. And if the sheriff also return *nihil* to the second writ, and the bail or defendants do not appear, there shall be judgment against them. Dy. 168. a. two *nihil*s being deemed equivalent to a *scire feci*. Dy. 172. a. Yelv. 119. *Bromley v. Littleton*. Sty. Rep. 281. 288. 323. *Barcock v. Thompson*. [i] For in the king's bench in all cases there must be either one *scire facias* with a *scire feci* returned, or two writs of *scire facias* with *nihil*s returned. 8 Mod. 227. *Andrews v. Harper*. And so it is in the common pleas in all cases, except where the *scire facias* is to revive a judgment against the defendant himself who was party or privy to the judgment, for there one *scire facias* with a *nihil* is sufficient, Dy. 168. a.; and there must be 15 days between the teste and return of such *scire facias*, which makes it equivalent to two. Formerly both writs of *scire facias* were sued out together, by making the *teste* of the second, as if the first had been actually returned; but the court of K. B. made a rule, that both shall not be sued out together, but the first must be duly returned before the *alias scire facias* can

[h] It seems to be discretionary in the court whether they will amend a *sci. fa.* against bail. 2 B. & Pull. 275. *Perkins v. Pettit*. 2 N. R. 103. *Stevenson v.*

Grant. 3 Bos. & Pull. 321. *Fulwood v. Anniss*. 9 East, 316. *Braswell v. Jeco*.

[i] 1 East, 86. *Clarke v. Bradshaw*. 4 East, 310. *Hayward v. Ribbans*.

be sued out. 2 Salk. 599. *Anon.* 8 Mod. 227, 228. *Andrews v. Harper.* And indeed, although the intent of the *scire facias* is to give notice to the party, yet by the general practice, the intent is wholly defeated; for the defendant may be summoned or not, as the plaintiff thinks fit, and if he takes out two writs of *scire facias* with *nihil* returned to each, the defendant never has any notice. [k]

The defendant either appears, or makes default; in the latter case the plaintiff is entitled to judgment. See Com. Dig. Pleader, (3 L. 8, 9.) And where a man recovers judgment for damages against two, and sues out a *scire facias* against them to have execution, if it be returned that one was summoned, and he makes default, and that the other has nothing, the plaintiff may have execution against him, who was summoned and made default, for the whole. 1 Roll. Abr. 890. (S.) pl. 1. So if it be returned that one of them is dead, and that the other was summoned, and he makes default, the plaintiff shall have execution for the whole against the survivor. Ibid. pl. 2. When judgment is signed, the proceedings in *scire facias* must be entered on a roll, and execution awarded. See the form of the entry of the proceedings against bail, where there is judgment by default upon a *scire feci* returned. Imp. K. B. 402. 4th edit. Imp. C. B. 542, 543. 4th edit. Tidd's Prac. Forms, 404., and where there is judgment against them by default on two *nihil*s. Lill. Ent. 403. 380. 1 Rich. Prac. C. P. 392. 5th edit. Imp. K. B.

401, 402. Imp. C. B. 545. Tidd's Prac. Forms, 404, 405. And where the writs of *scire facias* are of different terms. Imp. C. B. 546. See the form of the entry of the proceedings in other cases, where there is judgment by default upon a *scire feci* returned. Lill. Ent. 383, 389. Thes. Brev. 95, 96. Hans. 127. 138. Imp. K. B. 388. Tidd's Prac. Forms, 459, and where there is judgment by default on two *nihil*s. Clift. 682. Imp. K. B. 387. Tidd's Prac. Forms, 460, 461.

If the bail or defendants appear to the *scire facias*, the plaintiff must declare against them. See the form of the declaration in *scire facias* against bail. Tidd's Prac. Forms, 407. 463. &c. Imp. K. B. 403. Imp. C. P. 546. against the heir and terre-tenants. Tidd's Prac. Forms. 465. Imp. K. B. 388. Imp. C. P. 528. A declaration in *scire facias* returnable the last return of a term, may be entitled of the same term generally, for the court considers the whole term as one day. 3 Wils. 154. *Ward v. Gansell.*

And in a declaration by executors or administrators, it is usual to make a proffer of the letters testamentary, or of administration. See ante, 9. *Jefferson v. Morton*, note (12).

A man may plead in bar, or in abatement, to a *scire facias*, as well as to other actions. 10 Mod. 112. *Alice v. Gale.* 2 Inst. 470.

As to pleas in abatement, see ante, p. 8. note (10); p. 12. note (19). To a *scire facias* against bail in the action, they may plead *nul tiel record*

[k] By rule 5 Geo. 2. Easter Term, explained by the court in 4 B. & A. 537. *Wilson v. Farr*, every writ of *sci. fa.* of which notice shall be given to the defendant, shall be left in the sheriff's office four days before the return, exclusive of the return day: and every writ of *alias scire facias* shall be left four days, exclusive as well of the day on which it is lodged as of the return day: the days must be the four last days. 4 T. R. 583. *Forty v. Hermer.* See also 1 East, 89. note, *Williams v. Mason.*

of the recognizance. Lib. Plac. 285. Thes. Brev. 295., or of the judgment against the principal. So the bail may plead a satisfaction by, or a release of the judgment to, the principal [l] or bail. Com. Dig. Bail, (R.6.) 1 Roll. Abr. 336. pl. 3. or payment since the statute 4 Ann. c. 16. s. 12. Lib. Plac. 282. But the bail cannot plead the bankruptcy and certificate of the principal in bar either to an action of debt, or to a *scire facias*, on the recognizance. 2 Bos. & Pull. 45. *Donnelly v. Dunn*. So the bail may plead that the principal rendered himself, or was rendered by the bail, before the return of the *capias ad satisfaciendum*; 1 Ld. Raym. 156, 157. *Wilmore v. Clerk*; Sir W. Jones, 139. *Calf v. Dingley*; or that the principal died before the return of the *capias ad satisfaciendum*. 1 Roll. Abr. 336. pl. 2. Hutt. 47. *Suggs v. Sparrow*. Sir W. Jones, 29. S. C. 139. *Calf v. Dingley*. Sty. Rep. 324. *Barcock v. Thompson*. Lib. Plac. 280. And the defendant ought to shew in his plea when the principal died. Cro. Jac. 97. *Williams v. Vaughan*. And the plaintiff in his replication must state a particular *capias ad satisfaciendum* sued out against the principal, and that he was alive at the return of that *capias ad satisfaciendum*,

and conclude with a verification. Carth. 4. *Fortune v. Davis*. 2 Wils. 65. *Filewood v. Popplewell*. Doug. 58. *Chandler v. Roberts*. 2 Term Rep. 576. *Henderson v. Wisky*. [m] The bail may also plead in discharge of their liability that no *capias ad satisfaciendum* issued against the principal. Sty. Rep. 281. 324. *Barcock v. Thompson*. 2 Lutw. 1285. *Redman v. Idle*. Lib. Plac. 212. pl. 6. And a void writ is as none, as if it be tested before the judgment was had. 3 Keb. 671. *Vere v. Holyoke*. See 1 H. Black. 74. *Cawler v. Jolley*. [n] But if there be only an irregularity in suing out the writ, as if it be sued out after a year without a *scire facias*; 2 Ld. Raym. 1096. *Cholmondeley v. Bealing*; S. C. 6 Mod. 304; or made returnable on a day out of term; 2 Burr. 1187. *Campbell v. Cumming*; the bail cannot take advantage of the irregularity by pleading.

But it is not a good plea, that the principal died before the issuing of the *capias ad satisfaciendum*; for though it is conclusive, if found for defendant, it is not so, if found for the plaintiff; because the principal may still have died after the issuing, and before the return of the writ; 10 Mod. 267. 303. *Weddal v. Jocar*; but the proper plea is that the principal died before the return of the *capias*

[l] But they cannot plead any parol agreement made with the principal. 8 Price, 467. *Bulteel v. Jarrold*.

[m] And the replication may either pray judgment generally, or conclude with a prayer that the court may inspect the record, and give a day to the defendant. 2 Bos. & Pull. 302. *Tipping v. Johnson*. 7 Taunt. 30. *Jackson v. Wickes*. 2 Marsh. 354. S. C. see ante, 1 Saund. 92. note [b].

[n] Or if be issued into a wrong county; for where the defendants (the bail) pleaded that no *ca. sa.* against
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the principal was *duly* issued, the plaintiff replied, setting out a *ca. sa.* into *Middlesex*, and the defendants rejoined that the venue in the original action was *London*, the court held that the practice of the court was in this case pleadable, and that the rejoinder was no departure from the plea by reason of the word *duly*. 16 East, 39. *Dudlow v. Watchorn*. The bail may also plead a writ of error, allowed before the return of the *ca. sa.* 2 East. 439. *Sampson v. Brown*.

ad satisfaciendum. Lib. Plac. 280. Neither is it a good plea, that the principal died *after* the return of the writ of *capias ad satisfaciendum*; the recognizance being in strictness forfeited upon the return of *non est inventus*; for though a render afterwards on the return, or appearance day, of the second *scire facias*, where two *nilis* are returned, or of the first *scire facias* where *scire feci* is returned, *sedente curia* is allowed, yet that is merely *ex gratia*, and not *ex debito justitiæ*, and therefore cannot be pleaded. Sty. Rep. 324. *Barcock v. Thompson*. Com. Dig. Bail, (Q. 2.) Barnes, 106, 107. *Whitehead v. Gale*. 8 Mod. 340. *Anon.* 1 Wils. 270. *Simmonds v. Middleton*. 2 H. Black. 593. *Lardner v. Bassage*. And if the principal die after the return of the *capias ad satisfaciendum*, and before the return is filed, the bail are fixed, and the court will not stay the filing of the return. 6 Term Rep. 284. *Rawlinson v. Gunston*.

To a *scire facias* on a judgment, the defendant may plead *nul tiel record*. Com. Dig. Pleader, (5-L. 15.) or payment since the statute 4 Ann. c. 16. s. 12., or a release; or that the debt and damages were levied on a *feri facias*; Clift. 675. 4 Leon. 194. *Mountney v. Andrews*; or that his lands were extended for them upon an *elegit*; Dy. 299 b. 1 Lev. 92. *Glascock v. Morgan*; or his person taken in execution on a *capias ad satisfaciendum*. 1 Salk. 271. *Scott v. Peacock*.

It seems settled, that the defendant cannot plead any matter to the *scire facias* on a judgment, which he might have pleaded to the original action. Cro. Eliz. 283. *Allens v. Andrews*. 588. *Middleton v. Hill*. 1 Sid. 182. *Rowe v. Bellascys*. 1 Salk. 2. *West v. Sutton*. S.C.

2 Ld. Raym. 853. 2 Str. 1043. *Bush v. Gower*. S. C. Cases temp. Hardw. 233. Cowp. 727, 728. *Cook v. Jones*. It is said that if an executor pleads *plene administravit* to a *scire facias* brought against him upon a judgment against his testator, it is bad on a special, though good, on a general, demurrer; but the executor ought to plead, that he had nothing in his hands at the time of the death of his testator, or that no goods came to his hands except so much, if any did, and shew how he administered them. Moor, 858. *Harecourt v. Wrenham*. Cro. Eliz. 575. *Ordway v. Godfrey*. All. 47, 48. *Petchet v. Woolston*, Co. Ent. 617. 1 Salk. 296. *Newton v. Richards*. S. C. Comb. 298. Skin. 565. 4 Mod. 296. But this seems questionable, and indeed Lord Holt said, in the above case of *Newton v. Richards*, that precedents prevailed with him more than the reason of the thing. Comb. 298. and the plea is pleaded. Post, 220. and no objection is made to it.[o] Where interlocutory judgment was obtained against the defendant, who afterwards died, having made a will, and the plaintiff died intestate before final judgment, and his administrator sued out a *scire facias* on the 8 & 9 Will. 3., against the defendant's executor, it was held that the executor could not plead a judgment obtained against him on a bond due from his testator, and no assets *ultra*, &c.; for the statute did not intend that the executor should be in a better situation, as to the assessing of damages upon the inquiry, than his testator, who could have pleaded nothing but a release, or other matter in bar arising *puis darrein continuance*. 1 Salk. 315. *Smith v. Harmon*. 8. C. 6 Mod. 142. There seems to be a mistake in the

[o] And see 6 T. R. 384. *Hickey v. Hayter*, in which it seems to have been agreed on all hands, tha such a

plea is good; and see also ante 9, note 5.

report in stating that the intestate sued the *executor*, and obtained interlocutory judgment against him. From the reasons on which the decision appears to be founded, the fact seems to have been that the intestate obtained interlocutory judgment against the *testator*, and a *scire facias* was sued out against his *executor*.

If a *scire facias* be sued out on a judgment, and the sheriff return two *nils*, and execution is awarded, and the defendant has a release or acquittance or other matter, which he might have pleaded to the *scire facias*, he may relieve himself by *audita querela*, though not by writ of error; but if the sheriff return *scire feci*, the defendant is estopped for ever, and cannot by any means take advantage of that matter, because he might have pleaded it upon the return of the *scire facias*. F. N. B. 237. 7 edit. 1 Salk. 93. Anon. 1 Wils. 98. *Cooke v. Berry*. Sty. Rep. 281. 288. 323. *Barcock v. Thompson*. 1 Salk. 262. *Lampton v. Collingwood*. S. C. 4 Mod. 814. 1 Str. 197. *Wright v. Kitchingman*. 1 Salk. 264. *Wicket v. Creamer*. And where the case is clear, 2 Ld. Raym. 1295. *Ludlow v. Lennard*; or the application recent, Barnes, 277. *Whitehead v. Gale*; the court will relieve the party upon motion, without putting him to an *audita querela*. 1 Salk. 93. Anon. [p], but they will never interfere in a summary way, where the fact is disputed; 2 Str. 1198. *Mitford v. Cordwell*; or there has been a long acquiescence, and several steps have been taken subsequent to the award of execution. 2 Str. 1075. *Wharton v. Richardson*; or the ground of relief be such mat-

ter of fact as may be proper to be tried. 1 Salk. 264. *Wicket v. Creamer*.

No damages for delay of execution can be given in a *scire facias*, nor could costs, until the statute 8 & 9 W. 3. c. 11. s. 3. which enacts "that in all suits upon any writ or writs of *scire facias*, the plaintiff obtaining an award of execution after plea pleaded or demurrer joined thereon, shall recover his costs of suit: and if the plaintiff become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs and have execution for the same by *capias ad satisfaciendum, fieri facias* or *elegit*." The fifth section provides, "that the statute shall not extend to executors or administrators." If there should be a judgment for costs in a *scire facias* against an executor, the judgment is only erroneous in that part, and therefore may be reversed as to costs, and affirmed as to the residue. 1 Str. 188. *Bellew v. Aylmer*. It is holden, that this statute does not extend to a *scire facias* prosecuted in the name of the king to repeal a patent. 7 Term Rep. 367. *Rex v. Miles*. And it has been adjudged, that no costs are payable by the plaintiff on motion to quash his own writ before plea; Tidd's Prac. 1076, 1077. [q]; or after a plea in abatement. 1 Str. 638. *Pocklington v. Peck*.

(5) This objection seems to be well founded. It is holden, that if tenant by *elegit* or statute has levied part of the debt under the extent, the consor or defendant upon tender of the residue in court shall have a *scire facias ad re-habendam terram*, for it appears on re-

[p] 1 M & S. 199. *Holt v. Frank*, acc.

[q] But it has been since held that the plaintiff must pay costs on quashing his own writ of *scire facias* after the defendant's appearance and before plea.

1 B & A. 486. *Pickman v. Robson*. The practice in C. B. appears to be different. Tidd. 1160. Barnes, 431. *Poole v. Broadfield*.

cord how much was due at first, how much was paid, and what remains due. But if the conusor or defendant tenders the money, *but not in court*, and the tenant by *elegit*, or statute, refuses, he shall not have a *scire facias*. 2 Roll. Abr. 482. (J.) pl. 2, 3. 483. (K.) pl. 10, 11. 484. (L.) pl. 2. 485. (N.) pl. 8. That it is necessary to bring the money into court, appears from the following authorities. Bro. Scire facias, 43. 93. Bac. Abr. Execution, 347. Scire Facias, 415. and in Rast. 236. a. a profert of the money into court is stated, after the sheriff's return to the *scire facias*, agreeable to what is above contended for by the reporter.

(6) This is a *scire facias ad rehabendam terram*, and lies for avoiding executions upon judgments, recognizances, or statutes, and differs from the writ of *audita querela*, for that avoids an execution unjustly obtained at first; but the *scire facias* admits, that the execution was just at first, but insists that, inasmuch as the end for which it was granted is obtained, it ought of consequence to cease. Bac. Abr. Scire Facias, 414.

The words "*quousque debitum fuerit levatum*" in the statute of Westminster 2. c. 18. which gives the *elegit*, and "*quousque debitum fuerit satisfactum*" in the 13 Edw. 1. and 27 Edw. 3. which gives the statutes-merchant, and staple, are construed to mean, that the plaintiff or conusee shall hold the land not simply until *he be*, but until *he may be satisfied* without his wilful default. Therefore it is holden, that if tenant by *elegit*, or statute, neglect to take the profits, the defendant or conusor, at the time when the debt might have been satisfied thereout, may sue out a *scire facias* to have his land again, though he cannot in such case enter, that is, bring an ejectment. 4 Rep. 82. a. *Sir Andrew Corbett's case*. Dalt. Sher.

135. In some cases the conusor or defendant may have a *scire facias* to have his land again, before the tenant by *elegit*, or statute, can have been satisfied for the debt out of the extended value of the land: as where the defendant or conusor bring the whole or residue of the capital money into court, or has a release from the plaintiff or conusee, or has paid him the money, and has his acquittance; and he may also have a *scire facias* to account, as well as to have his land again, where the tenant by *elegit* or statute has been satisfied by some casual profit. Bro. Scire Facias, 32. 15 H. 7. 15. a. 2 Inst. 396. 2 Roll. Abr. 479. (D.) pl. 2. 481. pl. 6. 483. (K.) pl. 11. 14. Hard. 82. Bro. Scire Facias, 92. 50 Edw. 3. 16. 21 Edw. 3. 1. a. 2 Vent. 338. *Marsh v. Lee*. 2 Roll. Abr. 486. (P.) pl. 2. Dalt. Sher. 136. But the defendant or conusor cannot enter, because the possession of the plaintiff or conusee being founded upon matter of record, is not to be taken away by entry before he has an opportunity of answering in a court of record. 2 Roll. Abr. 479. (D.) pl. 2.

In case of an *elegit* upon a judgment, or recognizance at common law, when the tenant by *elegit* has received payment of his debt out of the usual and ordinary profits of the land, the defendant or conusor may enter, that is, bring an ejectment without suing out a *scire facias*, because tenant by *elegit* is only to retain the land until his debt be levied, and as that is a sum certain, it may be ascertained when the plaintiff was satisfied out of the extended value of the land: but when land is extended on a statute-merchant, statute-staple, or recognizance in the nature of a statute-staple, the conusor cannot enter though the conusee has received the whole debt, damages and costs, but must sue out a *scire facias ad computandum et reha-*

bendam terram; for by the acts of parliament which give those securities, the conusee is entitled to retain the land until he be satisfied for his debt, costs and damages, together with his reasonable labours and expenses, and as those are *uncertain*, and the conusee is in by matter of record, the conusor must, as we have already observed, sue out a *scire facias* against the conusee, before he can have his land restored. Bro. Scire Facias, 87. 2 Inst. 396. 680. 4 Rep. 67 a. b. *Fulwood's case*. 2 Roll. Abr. 479. (D.) pl. 3. 480. pl. 4. 482. (I.) pl. 1. 486. (P.) pl. 1. Dalt. Sher. 136. Hard. 82. Cro. Car. 598. *Burwell v. Harwell*. 2 Vent. 336. *Dighton v. Greenville*. Bac. Abr. Scire Facias, 414, 415. Execution, 346, 337.

The court, in the case of a *scire facias* for an account and to have the land back again, takes the account according to the extended value, which the sheriff always fixes much below the real value. But if the conusor or defendant goes into a court of equity, the conusee or plaintiff must account for the profits he has received above the extended value; but that is only done upon the terms of the defendant or conusor paying interest on the judgment, and such extra costs and damages as the plaintiff was necessarily put to by the defendant. 2 Vent. 338. *Marsh v. Lee*. 2 Vesey, 589, 590. *Earl of Bath v. Earl of Bradford*. Hard. 136.

If the conusee or plaintiff be wrongfully ousted by the conusor or defend-

ant, or any person claiming under the conusor or defendant for life or years, the conusee or plaintiff shall hold over. Co. Litt. 289. b. 4 Rep. 66 b. *Fulwood's case*. Dalt. Sher. 135. 1 Leon. 272. *Lord Stafford's case*. So if the wife of the conusor or defendant recover dower, the conusee or plaintiff shall hold over, for she claims by her husband. Ibid. If the conusee or plaintiff be interrupted from taking the profits of the land by reason of wars, that is, if the land or profits be destroyed by war, he shall not hold over, but it will be to his own disadvantage. Fitz. Execution, 246. 4 Rep. 82 b. *Sir Andrew Corbett's case*. Dalt. Sher. 135. But if the profits of the land are diminished or wasted by drowning of water, or by lightning, or by any other act of God, without the fault or negligence of the conusee or plaintiff, he shall hold over the land until he be satisfied his debt, because he is not in any fault. 15 H. 7. 14 b. 4 Rep. 82 b. Dalt. Sher. 133.

But no person can have a *scire facias* to account and have the land again, but the conusor, or defendant: therefore if the conusor or defendant, after the recognizance or judgment, grants a rent charge, and the conusee be satisfied, the grantee, that he may not be without remedy, may distrain, and in replevin or other action brought for taking the distress, issue may be taken whether the conusee has levied his debt, costs and damages or not. Sir W. Jones. 456. *Harewell v. Burwell*. S. C. Cro. Car. 597, 598

Termino Paschæ.

ANNO REGNI, CAR. II. 22.

Case 11.

Roberts *versus* Mariett.

Mich. 21 Car. II. Regis. Rot. 123.

S. C. 1 Mod. 42.
2 Keb. 614. 618.
The court after
demurrer joined
gave the plain-
tiff leave to dis-
continue, on
payment of
costs (1).

DEBT on bond conditioned to perform an award, so as the award be ready to be delivered on the 1st day of *May*; the defendant after oyer of the condition pleads, "no award made," and the plaintiff in his replication shews the award, and a breach of it by non-payment of the money awarded to be paid by the defendant to the plaintiff; but in the replication the plaintiff mistakes the day of tendering the award, and avers that the award was ready to be delivered on the twentieth day of *May*, whereas it ought to have been

(1) So after demurrer argued and allowed, the court has permitted a discontinuance, on payment of costs, where there was a mistake in the plaintiff in pleading. 2 Lev. 124. *Rea v. Burnis*. Ibid. 209. *Eut v. Withens*, 1 Lev. 191. *Jones v. Pope*, S. C. 1 Saund. 39. 1 Sid. 306. 1 Lev. 192. *Bennet v. Filkins*, S. C. 1 Saund. 23. 1 Lev. 298. *Martin v. Delboe*, 3 Lev. 440. *Stephens v. Cooper*, 1 Stra. 76. *Buller v. Malissy*, Ibid. 116. *Henderson v. Williamson*; but now the court usually gives the party leave to amend upon payment of costs. And after a *special* verdict, the plaintiff may discontinue by leave of the court, because it is not complete and final: this

however is a matter of great favor. 1 Salk. 178. *Price v. Parker*. And the court will not grant leave in a hard action. Cases temp. Hardw. 200, 201. *Boucher v. Lawson*. Nor will they do it, to give the plaintiff an opportunity of adducing fresh proof to contradict the verdict. 2 Black. Rep. 815. *Roe v. Gray*. And leave to discontinue is never granted after a *general* verdict. 1 Lev. 48. *Anon*. 1 Salk. 178. *Price v. Parker*, or after a writ of enquiry executed and returned. Carth. 86. *Stephens v. Etherick*. S. C. 1 Show. 63. Or after a peremptory rule for judgment on demurrer. 1 Salk. 179. *Turner v. Turner*.

upon the first day of *May*, and upon demurrer joined the record was read in the last *Hilary* term, and the court gave a rule for judgment for the plaintiff, unless cause, &c. at the beginning of this term. ROBERTS v. MARIETT.

And now *Baldwyn* serjeant, for the defendant, shewed to the court this mistake, whereupon *Saunders* for the plaintiff prayed leave to discontinue the action, upon payment of costs; which was opposed by *Baldwyn*, because the action was upon a penal bond, and the plaintiff had a remedy for his debt on the award itself; and because the plaintiff himself had put it upon the judgment of the court, and obtained a rule for judgment before this exception was taken, he prayed judgment for the defendant, and that the plaintiff should be barred of his action upon the bond; and he strongly urged that the plaintiff may bring his action upon the award, and therefore he ought not to be permitted to take advantage of a penalty, as he will do in this case, if he shall be permitted to discontinue.

Kelynge chief justice said to *Saunders*, why cannot you bring an action upon the award? To which *Saunders* answered, Sir, perhaps the defendant may wage his law to such action (2), and then we have entirely lost our debt. Then he asked *Baldwyn* if his client would bring the money awarded into court? who answered, that he had not any authority to offer it; whereupon the chief justice, with the assent of the other judges, because the mistake was in so small a matter, and the plaintiff had a just debt due to him, gave the plaintiff leave to discontinue the action upon payment of costs, and he did so accordingly. [74]

(2) And therefore debt does not lie against an executor or administrator upon an award made in the life time of the testator or intestate, if he demurs to the declaration. Cro. Eliz. 557. *Hampton v. Boyer*, 600. *Bowyer v. Garland*. 2 Roll. Abr. 107. (C.) pl. 3. But if the executor or administrator pleads in bar to the action, and a verdict is found against him, he cannot take advantage of it afterwards, either in arrest of judgment, or by writ of error. Plow. 182. a. *Norwood v. Read*. 10 H. 6. 25. a. Fitz. Executors, 21. Vaugh. 97—100. *Edgcombe v. Dee*. Cro. Jac. 47. *Fisher v. Richardson*. S.C. Yelv. 55. 1 Sid. 333. *Palmer v. Lawson*. [a]

[a] See ante, vol. 1. 217. and note [c].

Case 12.

Taylor versus Wells.

S.C. 1 Mod. 46.

1 Sid. 445.

2 Keb. 623. 640.

Trover, for ten
pair of curtains
and valence, is
certain enough.

TROVER; upon the general issue pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff had declared for ten pair of curtains and valence, which was urged to be uncertain, and entire damages being assessed by the jury, the plaintiff could not have judgment for any part; wherefore the judgment was staid.

And afterwards *Saunders* moved for judgment; and said that the words were certain enough, and should be taken to be ten pair of curtains, and ten pair of valence, which should be intended to be such as were usually part of the furniture of a bed. And in artificial things such as they are, no other description was necessary but to name them by the usual name by which they were commonly called, without shewing the quantity of goods, or the stuff of which they were wrought.

And of such opinion were *Kelynge* chief justice, *Rainsford* and *Morton* justices, who severally delivered their opinions; but *Twyssden* justice *contra totis viribus*, and he strongly urged the case of *Webb v. Washborn*, *Style's Rep.* 352., where it was adjudged as here, that four pair of hangings was uncertain. (1) And he said it was as uncertain in this case as in that; but notwithstanding his opinion, the plaintiff had judgment by the opinion of the three other justices.

(1) In the infancy of this action, it was held necessary in a declaration in trover, to ascertain the goods, which were the subjects of dispute, with as much certainty and accuracy, as was required in an action of detinue or replevin. Therefore where the declaration was for a *parcel* of lings, without specifying the quantity it contained, though there was a verdict and judgment for the plaintiff, it was reversed upon error. *Cro. Eliz.* 865. *Gramvel v. Rhobotham*. And a few years before, it was adjudged, that *trespass* for breaking the plaintiff's close, and taking his fish, without stating the nature and number of the fish, was bad after verdict. *5 Rep.* 34 b. *Playter's case*. But this

omission, it should seem, would now be holden to be cured after verdict, either at common law, *Cro. Jac.* 435. *Johns v. Wilson*; or by the statute of *jeofails* 16 & 17 Car. 2. c. 8., and after a general demurrer, or judgment by default, by stat. 4 Ann. c. 16. s. 1, 2. even if the action were merely for taking the plaintiff's fish; but if the declaration were for *breaking the close*, as well as for taking his fish, without specifying their number or kind, it seems it would be good even upon a special demurrer, because breaking the close is considered as the principal ground and foundation of the action, and taking the fish as matter of aggravation only. *2 Salk.* 643. *Layton v. Grindall*. *3 Wils.* 292. *Cham-*

berlain v. Greenfield. So trover for 200 weights of lead, and 200 weights of brass, without shewing the quantity, was held too uncertain after verdict. Sty. 247. *Powell v. Hopkins.* S. P. Latch. 216. *Walter v. Farmer.*

But the law does not now require so much precision and certainty in the description of the goods, as formerly: for if they are described according to common acceptance, it is sufficient. Thus trover for 400 "*ends*" of deal boards was adjudged to be sufficient, because workmen call all such short pieces of boards, as are not fit for wainscoting, flooring, and the like, "*ends*;" and being a particular term well understood, is a proper denomination for all short pieces of boards. 2 Ld. Raym. 1219. *Knight v. Barker.* 11 Mod. 66. S. C. So trover for two *packs* of flax, and two *packs* of hemp, without setting out the weight or quantity of a pack, is good after verdict, and it seems, even upon a special demurrer; for it is held that the defendant may plead the judgment in the action *in bar* to any other brought for the same thing; and if, in such new action, the plaintiff should declare of taking so much hemp or flax by *weight*, or in *quantity*, the defendant may aver that the packs in the first action contained that weight or quantity. 2 Ld. Raym. 991. *Thornton v. Bernard*: though it was formerly supposed, that the defendant could not plead it, which appears to have been the chief reason of requiring so much certainty in a declaration in trover. So trover for three *ricks* or *stacks* of hay, without alleging the quantity which each rick contained, is held to be good. 1 Mod. 289. *Wood v. Davies.* 1 Lev. 301. S. C. So for six *parcels* of lead. *Green v. Green*, cited 1 Vent. 106. *Jemey v. Norris*; or for a *library* of books, without expressing what they are, *Emery's case*, cited 1 Vent. 114. *Elpicke*

v. Acton; or two pieces of cloth. Sty. 419. *Isles v. Windsor.* So trover for a *suit* of knots was held sufficiently certain. 2 Show. 315. *Parkhurst v. Shefton.* Skin. 142. S. C. or for a *parcel* of thread, without mentioning the quantity or quality of it. 1 Lev. 308. *Jenny v. Norris*; for it is certain enough in this action, where *damages* only are to be recovered, and not the thing itself. S. P. 1 Ld. Raym. 191. *Copleston v. Piper*, per *Powell J.* So trover for three pieces of brandy-wine, and for four pieces of drawn grasett, was held good on demurrer. 1 Lord Raym. 192. So trover for 10 *weights*, for if the jury can understand the goods, it seems to be sufficient, and damages only are to be recovered; otherwise *in detinue*, where the thing itself is to be recovered. 12 Mod. 3. *Hook v. Galloway*; see also 2 Vent. 78. *Chamberlain v. Cook.* So trover for so many ounces of cloves, mace, and nutmegs, without specifying the quantity of each, was adjudged good after judgment by default, 1 Ld. Raym. 588. *Hartfort v. Jones.* 2 Salk. 654. S. C. So for a *piece* of tepee, without saying how many yards it contained. 2 Str. 738. *Radley v. Rudge.* And trover for a *parcel* of diamonds was held good in the C. B., affirmed in error in K. B., and afterward in parliament. 2 Str. 827. *White v. Graham*, So trover for 50 pieces of square timber wood, was held well on error. *Haslegrave v. Thomson*, cited 2 Str. 810. So trover for a *parcel* of packcloths, wrappers, and cords, was held well on error in K. B. after judgment by default in C. B. notwithstanding the uncertainty of the quantity which a parcel contains. 2 Str. 809. *Bottomley v. Harrison.* 2 Ld. Raym. 1529. S. C. So trover, of trespass, for *divers quantities* of china ware, earthen ware, and linen, without setting forth the particulars, was held good after judgment by default. Barnes, 276.

Hobbs v. Green. So trover for "old iron," was held good after verdict. Willes's Rep. 70. *Talbot v. Spear.*

Great certainty, however, and accuracy, in the description of the things demanded, is still required *in detinue*, because the plaintiff may desire to recover the specific things themselves, which can only be done in this action. Willes's Rep. 120. *Kettle v. Bromsall.* But with respect to *replevin*, although it was formerly holden, that the declaration in replevin must also be certain and particular in setting forth the number, kind and qualities, of the cattle or things distrained, because the sheriff cannot otherwise tell how to make deliverance of the same; as where the plaintiff declared, that the defendant took 100 ewe and wether sheep of the plaintiff, and there being a verdict for the plaintiff, an exception was taken to the declaration, that the number of the ewes and wethers was not ascertained, for the sheriff, being bound to make a return of each sort according to the writ, ought to have sufficient certainty within the record to enable him to do so, which the court agreed to; and thereupon arrested the judgment; All. 33. *More v. Clypsam.* Sty. 71. S. C.; yet, notwithstanding this case, it seems to be now settled, that a declaration in replevin being certain to a general intent, is sufficient, especially after verdict. As where the declaration was for taking divers goods and chattels, to wit, a certain *parcel* of lint, and a certain *parcel* of paper; the defendant avowed for rent; and after a verdict for the plaintiff, an exception was taken in arrest of judgment, that the declaration was uncertain in not specifying the quantities contained in the parcels: but *Parker C. J.*, who delivered the opinion of the court, said, that the declaration would undoubtedly have been ill on demurrer, but the defendant

having avowed the taking of the goods in the declaration, the avowry had cured the defect, as thereby both parties were agreed what the goods were; and the defendant himself having prayed a return of them, there was no controversy between him and the plaintiff about them: and to oblige the plaintiff to a greater certainty would have been of no service; for if he had demanded 500 reams of paper and proved only one, he must recover; *for in torts if the plaintiff prove any part of his case it is sufficient*: and, as to the difficulty of delivering the goods upon a *retorno habendo*, in case the avowant prevailed, he said there was no weight in that objection; for the sheriff, when he came to make a return, might have the defendant's assistance to shew him which were the goods; and he was not obliged to execute the writ, unless somebody attended to point out the things he was to deliver; and it is a good return for him to make "*quod nullus venit ex parte defend' ad ostend' averia.*" Rast. 570. b. Dalt. Sher. 274, and the case of *More v. Clypsam* was fully considered, and over-ruled. Bac. Abr. Replevin. H. 387. *Kempston v. Nelson.* MSS. case.

So where in replevin the plaintiff declared for taking fourteen skimmers and ladles, and three pots and covers; the defendant avowed the taking for rent in arrear upon a demise; the plaintiff traversed the demise, and issue being joined thereon, there was a verdict for the plaintiff, that there was no such demise; and afterwards an objection was taken to the declaration in arrest of judgment, that the description of the goods, namely, fourteen skimmers and ladles, without shewing how many of each sort, was too uncertain; but the court of K. B. when Lord *Hardwicke* was chief justice, over-ruled the objection upon the authority of the above-mentioned case of *Kempston v. Nelson*,

and held the description under these temp. Hardw. 110. *Bern v. Mattaire.*
 circumstances sufficiently certain. Cases 2 Str. 1019. S. C. [a]

[a] But where in replevin the plaintiff declared for taking divers goods and chattels, it was holden bad for uncertainty, after judgment by default; for there must be something to guide as to the nature of the goods taken. 7 Taunt. 642. *Pope v. Tillman.* 1 B. Moore, 386. S.C.

Mauleverer *versus* Hawxby.

Case 13.

Trinity, 21 Car. II. Regis. Rot. 1511.

Yorkshire, } **B**E it remembered that heretofore, to wit, in
 to wit. } Hilary term last past, before our lord the
 king at *Westminster*, came Sir *Richard Mauleverer* knight and
 baronet, late sheriff of the county of *York*, by *John Stone* his
 attorney, and brought here into the court of our said lord the
 king then there his certain bill against *Thomas Hawxby* of
Wallowthwait in the county of *York* yeoman, otherwise called
Thomas Hawxby of *Wallowthwait* in the said county yeoman,
 in the custody of the marshal, &c. of a plea of debt, and there
 are pledges of prosecution, to wit, *John Doe* and *Richard Roe*,
 which said bill follows in these words, to wit: *Yorkshire*, to wit,
 Sir *Richard Mauleverer* knight and baronet, late sheriff of the
 county of *York*, complains of *Thomas Hawxby* of *Wallow-*
thwait in the county of *York* yeoman, otherwise called *Thomas*
Hawxby of *Wallowthwait* in the said county yeoman, being Debt on bond.
 in the custody of the marshal of the marshalsea of our
 lord the king before the king himself, of a plea that he
 render to him 190*l.* of lawful money of *England*, which he
 owes to, and unjustly detains from him; for that whereas the
 said *Thomas*, on the 3d day of *October*, in the 20th year of
 the reign of our lord *Charles* the second now king of *Eng-*
land, &c. at *Rippon* in the said county, by his certain writing
 obligatory, sealed with the seal of the said *Thomas*, and to
 the court of our said lord the king now here shewn, the date
 whereof is the same day and year aforesaid, acknowledged
 himself to be held and firmly bound to the said Sir *Richard*,
 by the name of Sir *Richard Mauleverer* knight and baronet,
 sheriff of the county of *York*, (he the said Sir *Richard* then
 being sheriff of the county of *York* aforesaid,) in the said 190*l.*
 to be paid to the said Sir *Richard*, when he the said *Thomas*
 should be thereunto afterwards required, yet the said *Thomas*

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Impar lance.

Defendant prays
oyer of the bond.

Bond set forth.

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and also of the
condition,
which is set
forth,

(although often required,) has not yet paid the said 190*l.* to the said Sir *Richard*, but to pay the same to him has hitherto altogether refused, and still refuses, to the damage of him the said Sir *Richard* of 20*l.* And therefore he brings suit, &c.

And now at this day, to wit, on *Friday* next after the morrow of the *Holy Trinity* in this same term, until which day the said *Thomas Hawxby* had leave to imparl to the said bill, and then to answer, &c. before our lord the king at *Westminster*, come as well the said Sir *Richard Mauleverer* by his attorney aforesaid, as the said *Thomas* by *Henry Thompson* his attorney.

And the said *Thomas* defends the wrong and injury when, &c.

and prays oyer of the said writing obligatory, and it is read to him in these words, to wit, "Know all men by these presents,

"that we *William Markinfeld* of *Markinton* in the county

"of *York* gent. and *Thomas Hawxby* of *Wallowthwait* in the

"said county yeoman, and *John Atkinson* of *Markinton* in

"the said county yeoman, do acknowledge and confess our-

"selves to owe and be indebted unto *Richard Mauleverer*

"knight and baronet, high sheriff of the county aforesaid,

"in the whole and just sum of one hundred and ninety

"pounds of good and lawful money of *England*, to be paid

"unto the said sheriff, or his certain attorney, for which

"payment well and truly to be made, we do jointly and

"severally bind us, and every of us, our heirs, executors,

"administrators and assigns, firmly by these presents, sealed

"with our seals, and dated the third day of *October*, in the

"twentieth year of king *Charles* the second, and in the year

"of our Lord one thousand six hundred and sixty-eight:"

which being read, he the said *Thomas* also prays oyer of the

condition of the said writing obligatory, and it is likewise

read to him in these words, to wit, "The condition of this

"obligation is such, that if the above bound *William Mark-*

"*infeld* be and appear before our said lord the king at

"*Westminster*, on *Saturday* next after the octave of *St.*

"*Martin*, to answer *John Booth* gentleman of a plea of

"trespass, and also to a bill of the said *John* against him

"the said *William* for sixty pounds of debt, and against him

"the said *William* for thirty two pounds and ten shillings

"more of debt, according to the custom, &c. then the con-

"dition of the obligation to be void and of none effect, or

"else the same to be in full power and virtue," which being

read and heard, he the said *Thomas* says, that the said Sir

Richard ought not to have or maintain his said action thereof

against him, because he says, that at the parliament of the lord *Henry* the sixth after the conquest, heretofore king of *England*, &c. holden at *Westminster* on the 25th day of *February*, in the 23d year of his reign, it was (amongst other things) enacted, by the authority of the said parliament, that sheriffs, under-sheriffs, sheriffs' clerks, stewards or bailiffs of liberties, servants or bailiffs, or coroners, should not take under colour of their office, by themselves, or by any other person to their use, of any person for making a return or panel, any thing as for a copy of the panel, except four-pence; and that the said sheriffs and all other the officers and ministers aforesaid, should let out of prison all and all manner of persons by them, or either of them arrested, or being in their custody by virtue of any writ, bill or warrant in any action personal, or by cause of indictment or trespass, upon reasonable security of sufficient persons having sufficient within the county where such persons should be let to security or mainprise, to keep their days in such places where the said bills, writs or warrants should require (such person or persons who should be or then were in their custody by condemnation, execution, *capias utlagatum*, or *excommunicatum*, surety of the peace, and all such persons who were or should be committed by the special command of any justice, and vagabonds refusing to serve according to the form of the statute of laborers, only excepted) and that no sheriff, nor any of his officers or ministers aforesaid, should take, or cause to be taken, or make any obligation for any cause before recited, or by colour of his office, but only to themselves of any person, nor by any person who should be in their custody by course of law, unless by the name of their office, upon condition that the said persons should appear at the day in the said writs, bills, or warrants, and in such places where the said writs, bills, or warrants should require. And if any of the said sheriffs, or officers, or ministers aforesaid, should make or take any obligation in any other form, by colour of their office, that the obligation should be void, as by the said act (among other things) is more fully manifest, and appears. And the said *Thomas* further says, that after the making of the said act of parliament, and before the making of the said writing obligatory, to wit, on the 10th day of *June*, in the 20th year of the reign of our lord *Charles* the second, now king of *England*, &c. the said *John Booth* prosecuted out of the court of our said lord the king before the king himself at *Westminster*,

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and pleads the
statute 23 H. 6.
c. 9. of sheriffs'
bonds.

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J. B. sued out a
latitat against
W. M. directed
to the then she-
riff of Y.

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and delivered to
the sheriff.

(the said court then being at *Westminster* in the county of *Middlesex*) a certain writ of our said lord the king, called a *latitat*, to the then sheriff of the county of *York* directed, by which said writ our said lord the king commanded the said sheriff of *Yorkshire*, that he should take *William Markinfeld* gent. if he should be found in his bailiwick, and him should safely keep, so that he might have his body before our said lord the king at *Westminster*, on *Saturday* next after 15 days of *St. Martin*, to answer *John Booth*, gent. of a plea of trespass, and also to a bill of him the said *John Booth* against the said *William* for 60*l.* debt, and against him the said *William* for 32*l.* and 10*s.* more according to the custom of the court of our said lord the king before the king himself to be exhibited, and that he should have there that writ. Which said writ afterwards and before the return thereof, to wit, on the last day of *September* in the 20th year aforesaid, at the castle of *York*, in the county aforesaid, was delivered to the said Sir *Richard Mauleverer*, being then sheriff of the said county of *York*, to be executed in form of law; by virtue of which said writ the said Sir *Richard*, afterwards and before the return of the said writ, to wit, on the said 3d day of *October*, in the 20th year aforesaid, at the castle of *York* aforesaid, in the county aforesaid, (the said Sir *Richard* then and there being sheriff of the said county of *York*) took and arrested the said *William*, and then and there detained him in prison until the said *William*, and the said *Thomas*, together with the said *John Atkinson*, as his sureties, sealed, and as their deed delivered the said writing obligatory above-mentioned to the said Sir *Richard*. And the said *Thomas* further says, that the said Sir *Richard* then and there took the said writing obligatory, with the said condition underwritten, of and from the said *William Markinfeld*, and of and from the said *Thomas* and *John*, as his sureties, by colour of his office of sheriff of the said county, against the form of the statute. And so the said *Thomas* says, that the said writing obligatory, with the condition thereto above recited, so as aforesaid made and taken, in form and for the cause aforesaid, is void in law. And this he is ready to verify: wherefore he prays judgment if he ought to be charged with the debt aforesaid, by virtue of the writing obligatory aforesaid.

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General demurrer in the usual form, and joiner in demurrer.

*Et via ad iudicare
vult.*

But because the court of our said lord the king now here

is not yet advised what judgment to give of and upon the premises, a day thereof is given to the parties aforesaid before our lord the king at *Westminster*, until the next after to hear their judgment of and upon the premises because the court of our lord the king now here is thereof not yet, &c.

MAULE-
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HAWXBY.

Mauleverer *versus* Hawxby.

Case 13.

Trinity, 21 Car. II. Regis. Rot. 2511.

DEBT upon bond by *Mauleverer* late sheriff of *Yorkshire*, against *Hawxby*, and declares upon a bond entered into by the defendant to the plaintiff, by the name of his office of sheriff of *Yorkshire*, on the 3d of *October* in the 20th year of the reign of the now king; the defendant prays oyer of the condition, which is entered in this manner, to wit, "The condition of this obligation is such, that if the above-bounden *William Markinfield* be and appear before our lord the king at *Westminster* on *Saturday* next after the octave of *St. Martin*, to answer *John Booth* of a plea of trespass; and also to a bill of the said *John* against him the said *William* for 60*l.* of debt, and against him the said *William* for 32*l.* 10*s.* more of debt, according to the custom, &c. then the condition of this obligation to be void and of none effect, or else the same to be in full power and virtue," and thereupon the defendant pleads the statute 23 H. 6. c. 9. of sheriffs' bonds; and further says, that *Markinfield* was arrested by the plaintiff, then sheriff of the county of *York*, by virtue of a *latitat* out of this court, and the defendant, for the enlargement of *Markinfield*, entered into the bond with the condition aforesaid which by force of the statute was void in law, and to which there was a demurrer.

And the exception taken by the defendant was to the condition of the bond, in which it is said, that if *Markinfield* appear, &c. then the condition of this obligation shall be void, &c. where it should be, then this obligation shall be void, &c. And it was argued for the defendant, that if *Markinfield* had appeared at the return of the writ, the bond would be in force against the defendant; for it is said, that the condition shall be void, and then the bond will be single. And a single bond is altogether void by the statute, which requires such

S.C. 1 Sid. 456.
1 Mod. 35, 36.
2 Keb. 625.
If the condition of a bond be in this form, "the condition of this obligation is such, that if, &c. then the condition of this obligation to be void," the last words are void, and the condition is good without them.

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* S.P.Dy. 119.b.
10 Rep. 100 a. b.
Beawfage's case.

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* Dy. 364. a.
in marg.

bond to be with a condition for the appearance of the prisoner at the day contained in the writ; * but there is no condition to this bond, but only a condition to a condition, in which it is said, that the condition shall be void, but not that the bond shall be void; and so there are no words at all to make the bond void: and whether *Markinfield* had appeared or not, the bond is single and without a condition, and therefore the bond is against the statute; and for this reason judgment was prayed for the defendant.

But it was answered and resolved by the court, that the bond was good enough; for the words "then the condition," &c. are void for their absurdity and repugnancy; and no more regard is to be paid to them, than if they had been omitted, and they must be taken in the same sense as if the words had been, "then this *obligation* shall be void." And if the whole clause had been omitted, the bond and condition would have been good enough, for after the bond comes the condition in this manner, The condition of this obligation "is such, that if the said *Markinfield* appear," &c. which words alone shew that the bond was taken for the appearance of *Markinfield*, which was all that the statute requires, though the clause, "then this obligation shall be void," had been wholly omitted. And now the addition of useless and impertinent words shall not hurt the bond and condition which were perfect before. Wherefore judgment was given for the plaintiff. *Saunders* of counsel with the plaintiff.

Note; The defendant's attorney had subtly averred in his plea, that *Markinfield* was arrested by a writ returnable at another day than was contained in the condition of the bond †; but this being a trick he did not dare to take advantage of it, as he told me afterwards. And note, the like judgment was given upon such proceedings on the same bond, between *Mauleverer* and *Atkinson*, and between *Mauleverer* and *Markinfield*, in this term; and the roll is in Mich. 21 Car. 2. Regis. Rot. 299. and 300 (1).

The addition of useless and impertinent words do not hurt a bond and condition which were perfect before.

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† See 1 Saund.
22. Bennet v.
Filkins.

(1) See ante, 59. *Posterne v. Hanson*, note 3.

Richards & al' *versus* Hodges.

Case 14.

Trinity, 21 Car. II. Regis. Rol. 282.

Nottinghamshire, } **B**E it remembered, that heretofore, to wit, in
 to wit. *Easter* term last past, before our lord the
 king at *Westminster* came *Samuel Richards* and *Francis Samon*,
 church-wardens of the parish of *St. Peter*, in the county of
 the town of *Nottingham*, by *Ralph Edge* their attorney, and
 brought here into the court of our said lord the king then
 there his certain bill against *John Hodges* of the town of *Not-*
tingham, in the county of the town of *Nottingham*, iron-
 monger, in the custody of the marshal, &c. of a plea of debt;
 and there are pledges of prosecution, to wit, *John Doe* and
Richard Roe, which said bill follows in these words, to wit: Debt on bond.
Nottinghamshire to wit, *Samuel Richards* and *Francis Samon*,
 church-wardens of the parish of *St. Peter*, in the county of
 the town of *Nottingham*, complain of *John Hodges* of the
 town of *Nottingham*, in the county of the town of *Nottingham*,
 ironmonger, being in the custody of the marshal of the mar-
 shalsea of our lord the king before the king himself, of a plea
 that he render to them 100*l.* of lawful money of *England*,
 which he owes to, and unjustly detains from them; for that
 whereas the said *John*, on the 1st day of *August*, in the 19th
 year of the reign of our lord *Charles* the Second now
 king of *England*, &c. at *Bingham*, in the said county of
Nottingham, by his certain writing obligatory, sealed with the
 seal of the said *John*, and to the court of our said lord the
 king now here shewn, the date whereof is the same day and
 year aforesaid, acknowledged himself to be held and firmly
 bound to the said *Samuel* and *Francis*, in the said 100*l.*, to be
 paid to the said *Samuel* and *Francis*, when he should be
 thereunto requested. Yet the said *John* (although often
 required) has not yet paid the said 100*l.* to the said *Samuel*
 and *Francis*, or either of them, but to pay the same to them
 has hitherto altogether refused, and still refuses; to the dam-
 age of them the said *Samuel* and *Francis* of 10*l.* And there-
 fore they bring suit, &c.

And now at this day, to wit, on *Friday* next after the [81]
 morrow of the Holy Trinity in the same term, until which day Imparlance.
 the said *John* had leave to imparl to the said bill and then to
 answer, before our lord the king at *Westminster* come as well

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& al' v.
HODGES.

Defendant
prays oyer of the
condition of the
bond, which is
set out in *hæc*
verba,

and pleads *non*
damnificatus.

the said *Samuel* and *Francis* by their attorney aforesaid, as the said *John* by *Ralph Gregge* his attorney. And the said *John* defends the wrong and injury when, &c. and prays oyer of the said writing obligatory, and it is read to him, &c.; and he also prays oyer of the condition of the said writing obligatory, and it is read to him in these words, to wit, "The condition of this present obligation is such, that whereas *Mary Bates* hath been of late delivered of a man-child within the parish of *St. Peter's*, within the said town of *Nottingham*, to the which child the above-bounden *John Hodges* according to law stands charged to be the reputed father; if therefore the said *John Hodges*, his heirs, executors, administrators or assigns, or any of them, do from time to time and at all times hereafter, fully and clearly acquit, discharge and save harmless, as well the above-mentioned *Samuel Richards* and *Francis Samon*, church-wardens of the parish of *St. Peter's* aforesaid, and their successors for the time being, and every of them, as also the inhabitants and parishioners of the said parish, which now are, or hereafter shall be for the time being, and every of them, of and from all and all manner of costs, charges, troubles and incumbrances whatsoever, for or by reason of the birth, education, maintenance, nourishing and bringing up of the said child, and of and from all other actions, suits, charges, troubles and demands whatsoever, touching or concerning the same, that then this present obligation to be void and of none effect, or else to remain, continue and be in full force, strength, power and virtue." Which being read and heard, the said *John Hodges* says, that the said *Samuel Richards* and *Francis Samon* ought not to have or maintain their said action thereof against him, because he says, that the said *Samuel Richards* and *Francis Samon*, church-wardens as aforesaid of the parish of *St. Peter* aforesaid, and their successors, and the inhabitants and parishioners of the said parish for the time being, from the time of making the said writing obligatory hitherto, or either of them, were not in any manner damnified for or by reason of the birth, education, maintenance, nourishing and bringing up of the said child, in the condition aforesaid above-named, or for or by reason of any actions, suits, charges, troubles or demands whatsoever, touching or concerning the said child: and this he is ready to verify; wherefore he prays judgment if the said *Samuel Richards* and *Francis Samon* ought to have or maintain their said action thereof against him, &c.

And the said *Samuel* and *Francis* say, that, by any thing by the said *John* above in pleading alleged, they ought not to be barred from having their aforesaid action thereof against him the said *John*, because they say, that the said child in the said condition mentioned was born within the parish of *St. Peter* aforesaid, and that neither the said *John Hodges*, nor any other person, after the making of the said writing obligatory, and before the day of exhibiting the said bill of the said *Samuel* and *Francis*, to wit, for the space of one month from the first day of *March* in the 21st year of the reign of our said lord the now king, provided any maintenance or nourishment for the said child: wherefore the parishioners of the said parish of *St. Peter*, lest the child should perish through hunger and cold, during the whole time aforesaid, at *Bingham* aforesaid, were obliged to lay out and expend, and did lay out and expend, the sum of 4s. of lawful money of *England*, for the maintenance, nourishing and bringing up of the said child for the time aforesaid, and so the parishioners are damnified. And this they are ready to verify; wherefore they pray judgment and their said debt, together with their damages on occasion of the detention of the said debt, to be adjudged to them, &c.

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Replication.
The parishioner
to prevent the
child from starv-
ing maintained
it for a month.

And the said *John Hodges* says, that he the said *John* for the said space of one month from the first day of *March* in the 21st year aforesaid, would have nourished and maintained the said child at his own costs and charges, and on the said first day of *March* in the 21st year aforesaid, at *Bingham* aforesaid, offered to the said *Francis* and *Samuel*, and the said parishioners, to nourish and maintain the said child at his own costs and charges, and the said *Francis* and *Samuel*, and the said parishioners, then and there refused to permit him the said *John* to nourish and maintain the child at his own costs and charges; but the said *Francis* and *Samuel*, and the said parishioners, of their own wrong, and against the will of him the said *John*, then and there put the said child to nurse, and for the nursing and maintenance of the said child of their own wrong paid the said four shillings. And this he is ready to verify; wherefore, as before, he prays judgment, and that the said *Francis* and *Samuel* may be barred from having their said action thereof against him, &c.

Réjoinder.

That defendan
offered to main-
tain the child at
his own ex-
pence, but the
plaintiffs would
not suffer him
to do so, and
paid the money
of their own
wrong.

General demurrer; and joinder in demurrer.

But because the court our of said lord the king now here

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HODGES.

*Curia advisare
vult.*

is not yet advised what judgment to give of and upon the premises, a day therefore is given to the parties aforesaid before our lord the king at *Westminster*, until next after to hear their judgment of and upon the premises, because the court of our lord the king here is thereof not yet advised, &c.

Case 14.

Richards & al' *versus* Hodges.

Trin. 21 Car. II. Regis. Rot. 882.

S. C. 1 Sid. 444.
1 Mod. 43.
2 Keb. 619.
If the defendant pleads *non damnificatus* generally, and the plaintiff replies, and shews how damnified, and the defendant rejoins that the plaintiff was damnified of his own wrong, it is a departure.

DEBT upon bond by *Richards* and *Samon* against *Hodges*; the defendant prays oyer of the condition, which is, "That whereas *Mary Bates* hath been of late delivered of a man-child within the parish of *St. Peter*, in the town of *Nottingham*, to the which child the above-bound *John Hodges* according to law stands charged the reputed father; if therefore the said *John Hodges*, his heirs, executors, administrators or assigns, or any of them, do from time to time, and at all times hereafter, fully and clearly acquit, discharge and save harmless, as well the above-named *Samuel Richards* and *Francis Samon*, church-wardens of the parish of *St. Peter* aforesaid, and their successors for the time being, and every of them, and also all the inhabitants and parishioners of the said parish, which now are or hereafter shall be for the time being, and every of them, of and from all manner of costs, charges, troubles and incumbrances whatsoever, for or by reason of the birth, education, maintenance, nourishing or bringing up of the said child, and of and from all other actions, suits charges, troubles and demands whatsoever, touching or concerning the same, that then, &c." And upon this the defendant pleads *non damnificatus* generally: the plaintiffs reply that neither the defendant, nor any other, for the space of a month after the making of the bond, provided any maintenance for the infant, wherefore the parishioners, to prevent the infant from perishing with hunger and cold, during the whole time aforesaid were forced to pay, and had paid 4s., for the maintenance and nourishment of the infant, and so the parishioners were damnified, &c.; to which the defendant rejoins, that he would have nourished the infant at his own costs and charges during the whole of the said time, and offered to do it as well to the plaintiffs as to the other parishioners, but they

refused to permit him to do so; and of their own wrong, and against the will of the defendant, put the infant to nurse, and paid the 4s. [a] And this, &c. wherefore, &c. Upon which rejoinder the plaintiffs demurred in law.

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& al' v.
HODGES.

And by the court, the rejoinder was bad, because it was a departure from the first plea in bar: for the defendant in his plea says, that the parishioners were not damnified; and when the plaintiffs by their replication show how they were damnified, the defendant cannot rejoin, that the damnification was of their own wrong, as he has done here, but ought to have pleaded it at first in his plea in bar. And though *Saunders* of counsel with the defendant urged that it was not any damnification at all, because it was the voluntary act of the parish to put the infant to nurse, when the defendant himself offered to maintain it, *et volenti non fit injuria*, and they ought not to take advantage of their own wrong; yet *non allocatur*; for the court held clearly, that the rejoinder was a departure (1); and therefore it was adjudged for the plaintiffs.

(1) See *Newland v. Osman*, Burn's Justice, Bastard. *Simpson v. Johnson*, Dougl. 7. 2 Wils. 126. In a late case, however, similar to the present, the plaintiff, instead of demurring to the rejoinder, took issue upon it; though, upon the authority of this case, it seems he might have demurred upon it, as being a departure from the plea. That was debt on bond by the church-wardens of the parish of R. conditioned to indemnify the church-wardens and overseers of the poor, and the inhabitants and parishioners of R. against the charges which should arise, or be imposed upon them, on account

of the maintenance, and bringing up of such child or children, as one E. W. then went with, and should be delivered of. The defendant pleaded *non damnificatus*. The plaintiff replied, that the said E. W. was delivered of two children, and that neither the defendant, nor any person on his behalf, provided any food or nourishment for them: by reason whereof, the inhabitants of R., lest the children should perish for want of necessary food and nourishment, were forced and obliged to expend, and did necessarily expend 3*l.* in providing, &c. and were so damnified, &c.; the defend-

[a] In 4 Taunt. 498. *Strangeways v. Robinson*, the defendant pleaded a plea similar to this rejoinder, except that it did not show that the child was in the custody or power of the overseers, and on that ground, the court held the plea to be bad; at the same time giving no opinion as to the right of a putative father to the custody of a bastard after

the age of nurture: within that age he certainly has no right to the custody. 5 T. R. 278. *The King v. Soper*. 7 East, 579. *The King v. Hopkins*. 5 East, 223. *The King v. Moseley*, in note. But the father of a legitimate child has such a right. 5 East, 221. *The King v. De Manneville*.

ant rejoined, that no justice's order was ever made upon the inhabitants of R. for the maintenance and bringing up of the said children, or for the payment or allowance of the money, &c. ; and therefore if they did expend, it was of their own voluntary act and wrong, and if they were damnified it was of their own wrong, &c. The plaintiff took issue upon the rejoinder. 1 H. Bl. 253. *Hayes v. Bryant*. However this case is so much like the present in principle, that it seems no doubt can be entertained, that the rejoinder was a departure, for the defendant ought to have stated it in his plea at first, though indeed it would have been no defence to the action if he had, because the court held clearly, that an order of justices was not necessary to make the officers of the parish liable to do, what they were otherwise under a legal obligation of doing, namely, to provide necessaries for the children. [b]

A departure in pleading is said to be, when a man quits, or departs from the ground which he has first relied upon,

and has recourse to another ; it is, when his subsequent plea does not contain matter pursuant to his former, nor support and fortify it. Co. Litt. 304. a. One reason why a departure in pleading is never allowed, is, because the record would by such means be spun out into endless prolixity ; for he, who has departed from and relinquished his first plea, might resort to a second, third, fourth, or even fortieth defence : pleading would thereby become infinite ; he who has a bad cause would never be brought to issue, and he who has a good one would never obtain the end of his suit. See several cases as to what shall be a departure, cited 1 Saund. 117. *Cutler v. Southerne*, note (3). Thus, if the declaration be founded on the common law, the plaintiff in his replication cannot maintain it by a special custom. Co. Litt. 304. a. But if an action be brought to recover a penalty given by statute, and the defendant pleads a repeal of the statute by another act, the plaintiff may reply that the first statute was afterwards revived, and it is no

[b] The statute 6 G. 2. c. 31., which directs security to be given to the parish, does not authorize the parish officers to take a promissory note absolute for a sum certain, it being contrary to public policy, and giving the parish an interest in the death of the child. 6 East, 100. *Cole v. Gower*. And if a sum of money be paid to the parish, and the child afterwards die, the putative father may recover back all that is not expended, as money had and received to his use. 1 Brod. & Bing. 1. *Watkins v. Hewlett*. 1 Camp. 396. *Townson v. Wilson*. For the same reason, where a bond to indemnify is given, and the obligor becomes bankrupt, the parish cannot prove the penalty under the commission, and so receive a sum certain ; and the bankrupt's certificate

is no bar to an action on the bond for expences after the bankruptcy. 1 B. & A. 491. *Overseers of St. Martin's v. Warren*. But a voluntary bond given by the putative father, conditioned for payment of a sum certain every three months, until the child should be deemed capable of providing for herself, was held good. 1 M. & S. 310. *Middleham v. Bellerby*. So a bond for payment of a certain sum weekly while the child should remain chargeable. 4 Taunt. 498. *Strangeways v. Robinsan*.

By 54 Geo. 3. c. 170. s. 8. actions on securities for indemnifying the parish against the charge of bastard children must be brought in the names of the overseers for the time being, and not in the names of the original obligees. 3 B. Moore, 21. *Addy v. Woolley*.

departure. Cro. Car. 258. *Butler v. President of College of Physicians*. So, where in debt on bond with a condition to be a true prisoner without making any escape, the defendant pleaded, that J. L. did remain a true prisoner without committing any escape, &c.; the plaintiff assigned a breach, that 13th January J. L. made an escape; the defendant rejoined, that J. L. went a little way out of the rules of the prison, but being sent for back by the plaintiff, he immediately returned with the consent of the plaintiff, was accepted as his prisoner, and so continued ever since; to which it was demurred. And by *Reeve C. J.* here is a breach assigned, to which the defendant rejoins, that J. L. did make an escape, for he says he went out of the rules of the prison, which is an escape at common law. 3 Rep. 44. a. *Boyton's case*, and also by statute 8 and 9 W. 3. c. 27. s. 1.: and then he returned with consent of the plaintiff; this is a departure, for if it would excuse the escape, it should have been pleaded at first. Com. Rep. 553. *Gambier v. Larkin*. So where in trespass for impounding the plaintiff's mare, the defendant pleaded, that she was doing damage to the king in his forest of *Waltham*: the plaintiff in his replication entitled himself to a right of common in the forest for a mare, and therefore he put the mare there to use his common: the defendant rejoined, that the mare was mangy and doing damage, and therefore he took and impounded the mare, because she was wrongfully and unlawfully in the forest: the rejoinder was held to be a departure from the plea; because the plea is, that the mare was doing a *private trespass* to the king in his forest of W., and therefore the defendant impounded her; but the rejoinder is, that the mare was mangy, which, by the statute 32 H. 8.

c. 13. s. 11. is a *common nuisance* inquireable in the leet, and therefore the defendant impounded her. 2 Wils. 96. *Palmer v. Stone*. And where in replevin for taking the plaintiff's *goods and chattels*, to wit, one lime-kiln, the defendant avowed for rent in arrear, and the plaintiff in his plea in bar said that the lime-kiln was *affixed to the freehold* of the piece or parcel of ground on which, &c. and as such was by law exempt from a distress for rent, to which the defendant demurred generally; the court held, that the plea in bar was a departure from the declaration; that the declaration, treating the lime-kiln as a *chattel*, might possibly have been true, because lime may be burnt in a portable oven, and the kiln need not therefore necessarily be affixed to the freehold; but as the plea in bar stated it to be affixed to the *freehold*, it was inconsistent with the declaration. 4 Term Rep. 504. *Niblet v. Smith*. So where to debt on an annuity bond the defendant pleaded, *that no such memorial of the bond*, as is required to be enrolled in Chancery by the statute 17 Geo. 3., was enrolled, &c. before the commencement of the plaintiff's suit: the plaintiff replied, that a memorial of the bond was enrolled, which contained the day of the month and the year when the bond bore date, and the names of all the parties and witnesses, and set forth the annual sum to be paid, and the name of the person for whose life the annuity was granted, *and the consideration of granting the same*; the defendant rejoined, *that true it was that the memorial of the bond was enrolled*, but alleged that the memorial did not truly set forth the consideration on which the annuity was granted. The court was clearly of opinion, that the rejoinder was a departure from the plea. A memorial was enrolled, which upon the face of it was a good one; and if

the defendant wished to impeach it, he should have pleaded it at first, and shewn in what particular it was defective, and thus have compelled the plaintiff to take issue upon that fact; but, having in his plea in bar alleged that *there was no memorial*, he ought not afterwards to be permitted to admit, in his rejoinder, *that there was one*, and then deny the validity of it; that the words "no such memorial," like the words "no such award," or "no *capias ad satisfaciendum*," tender issues *in fact*, and not in law; that if the plaintiff had taken issue on the allegation of "no such memorial, &c." the parties could not, upon that issue, have gone into the objection to the memorial, which arises under the act of parliament, any more than they can upon the issue of *no award*, where there is an award in fact, go into objections to the award in point of law. 4 Term Rep. 585. *Praed v. Duchess of Cumberland*. And where in trespass for impounding the plaintiff's ox, the defendant justified the taking damage feasant, and impounding it; the plaintiff entitled himself to common of pasture for one ox, in the place in which, &c. and that he put the ox there to use his common; the defendant rejoined, that the plaintiff had surcharged the common with that ox, and that he took and impounded him surcharging the common; it was adjudged, that the rejoinder was a departure from the plea; for there was a great deal of difference between damage feasant, and a surcharge of common; that the surcharge should have been pleaded at first. 1 Salk. 221. *Countess of Arran v. Crispe*; because the defendant then knew the plaintiff's right. Willes's Rep. 638. *Ellis v. Rowles*. So where in debt on bond given by the defendant on his marriage, with condition that he would permit his in-

tended wife, either during the marriage, or by will, to dispose of 50*l.* out of his personal estate, the defendant pleaded that he had not prevented his wife from disposing of that sum according to the terms of the condition; the plaintiff in his replication set forth a particular appointment of the money by the wife according to the condition of the bond, a notice to the defendant of the appointment, a request to pay, and a refusal by him; the defendant rejoined that he had not any personal estate out of which he could pay the 50*l.*; the rejoinder, on a general demurrer, was held to be bad, because it was a departure from the plea; though it would have been no defence if pleaded at first, because the defendant is estopped by the condition of his bond to say that he had not sufficient personal estate. Willes's Rep. 25. *Cossens v. Cossens*. So where in *assumpsit* by an executor on several promises, which were all laid to be made to the testator in his life time, to which the defendant pleaded the statute of limitations, and the plaintiff replied a subsequent promise to *himself*, the replication was held to be a departure and therefore bad. Ibid. 27. *Hickman v. Walker*. And where to debt on bond, the defendant, after praying oyer of the condition, which was for performance of an award, pleaded no award made; the plaintiff replied, and shewed an award; the defendant rejoined that other matters were referred, of which the arbitrators had not taken any notice, and therefore it was no award, and thereupon the plaintiff demurred; the court adjudged that the rejoinder was a departure from the plea, for the defendant ought to have pleaded this special matter in his plea at first. 1 Sid. 180. *Morgan v. Man*. Sir T. Raym. 94. S. C.; and see 1 Wils. 122. *Harding v. Holmes*, which is precisely

the same case with *Morgan and Man*. [c] And if the defendant, in debt on bond conditioned (among other things) for payment of rent reserved in such an indenture of lease, pleads *performance* generally, and the plaintiff assigns a breach, in non-payment of the rent, and the defendant rejoins that *he offered* to pay it, this is a departure; for an offer and refusal is not the same as a performance. Cro. Car. 76, 77. *Chapman v. Chapman*. See also 4 Leon. 79. *Clinton v. Bridges*. Dy. 253. b. 2 Mod. 31. *Sams v. Dangerfield*. Post. 188. But where the plaintiff states generally in his declaration, that he demised certain premises to the defendant, who pleads *nil habuit in tenementis*, which *prima facie* is a good plea, the plaintiff may reply a demise by indenture, and

so estop him, and the replication will be no departure. 3 Leon. 203. *Thorp v. Wignfield*; vid. 1 Saund. 325. n.(4).

A departure in pleading seems to be matter of substance, and bad upon a general demurrer, as may be collected from 2 Wils. 96. *Palmer v. Stone*. 1 Wils. 122. *Harding v. Holmes*. 4 Term Rep. 504. *Niblet v. Smith*. Willes's Rep. 638. *Ellis v. Rowles*. 25. *Cossens v. Cossens*. Ibid. 27. *Hickman v. Walker*. 1 Saund. 117. *Cutler v. Southern*, note(3). The only mode of taking advantage of a departure, is by demurrer; for if the defendant, instead of demurring, take issue upon a replication, containing a departure, and it be found against him, the court will not arrest the judgment. Sir T. Raym. 86. *Lee v. Rayner*.

[c] But since the decision in 11 East, 188. *Fisher v. Pimbley*, ante, vol. i. 327. note [d], that after a plea of *nil agard*, the defendant may in his rejoinder show an award void in law, because it is the same as no award; it should seem that such a rejoinder as was pleaded in *Morgan v. Man* would not be held to be a departure. And the same observation applies to the rejoinder

in *Praed v. Duchess of Cumberland*. So where bail pleaded to a *scire facias*, that no *ca. sa.* was *duly* issued against the principal, and the plaintiff replied a *ca. sa.* into *Middlesex*, a rejoinder that the venue in the action was in *London*, was held no departure. 16 East, 41. *Dudlow v. Watchorn*, ante, Vol. II. 72 s. note [n].

Hesketh versus Lee & al'.

Case 15.

Pasch. 21 Car. II. Regis. Rot. 408.

ENGLAND, to wit. OUR lord the king has sent to his chancellor in his county palatine of *Lancaster*, or to his deputy there, his writ close in these words, to wit; *Charles* the 2d, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to our chancellor in our county palatine of *Lancaster*, or to his deputy there, greeting: Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our court at *Lancaster* by our writ of entry *sur disseisin in the post*,

Writ of error.

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HESKETH v. LEE & al'. between *Thomas Legh, esq. and Alexander Rigby, esq. and Thomas Hesketh*, of the manors of *Rufforth, Martholme, Harwood, Longton, Croston, Hesketh cum Becconsal, Tarlton cum Sallom, Mawdesley, Wrightington, Shevington, Houghwicke and Nether-Wittingham* with the appurtenances, and of 323 messuages, 4 mills, 1000 acres of land, 267 acres of meadow, 1000 acres of pasture, 2000 acres of moor, and 2000 acres of furze and heath with the appurtenances in *Rufforth, Martholme, Harwood, Longton, Croston, Hesketh cum Becconsal, Tarlton cum Sallom, Mawdesley, Wrightington, Shevington, Houghwicke, Nether-Wittingham, Holmeswood, Tattileworth, Lancaster, Preston, Wigan, Ormschurch, Penwortham, Hatton, Muchhoole, Bretherton, Eccleston juxta Croston, Bispham, Newbrowe, Newborough in Lathom, Parbould, Samlesbury, Newton cum Scales, Barton in Downholland, Bickerstaffe, Winstanley, and in Scarsbricke*, with the appurtenances in the county of *Lancaster*, manifest error has invented, to the great damage of the said *Thomas Hesketh*, as by his complaint we are informed: We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that by our writ under the seal of the county palatine aforesaid, you make your mandate to our justices at *Lancaster*, that they send to us into the chancery of the said county under their seals, the record and proceedings of the said recovery, with all things touching the same, which are in their custody, as it is said, before 15 days of *Easter*, and our writ, which shall thereof come to them, and that you send to us distinctly and openly under the seal of the county aforesaid, the record and proceedings of the recovery aforesaid, and this writ, so that we may have them in five weeks from the day of *Easter*, wheresoever we shall then be in *England*, that the record and proceedings of the said recovery being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of *England* ought to be done. Witness ourself at *Westminster*, the 4th day of *February* in the 21st year of our reign.

The answer of
the chancellor
of the said
county palatine.

The answer of Sir *Thomas Ingram, knt.* chancellor of the county palatine of our lord the king at *Lancaster* to this writ:

By virtue of this writ to me directed and delivered, I have, by another writ duly made under the seal of the said county palatine, made my mandate to the justices within mentioned,

as within I am commanded; which said justices, to wit, Sir *Christopher Turner*, knt. one of the barons of the exchequer of our Lord the now king at *Westminster*, and Sir *Richard Rainsford*, knt. one of the justices of our said lord the king assigned to hold pleas before the king himself, justices of our said lord the king at *Lancaster*, have answered that the record and proceedings of the recovery whereof mention is within made, with all things concerning the same, they have sent to me in the said chancery of the county palatine aforesaid, which said record and proceedings of the said recovery I send to our said lord the king at the day within-contained, as within I am commanded.

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LEE & al'.

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By the chancellor himself.

Original and judicial writs of the session holden at *Lancaster*, on *Friday* the 80th day of *August*, in the 13th year of the reign of our lord *Charles* the 2d, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. *Charles* the 2d, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to the sheriff of *Lancashire*, greeting: Command *Thomas Hesketh*, esq. that justly and without delay he render to *Thomas Legh* and *Alexander Rigby*, esqrs. the manors of R. M. H. L. C. H. cum B. T. cum C. S. M. W. S. H. and N. W. with the appurtenances, and 323 messuages, 4 mills, 1000 acres of land, 267 acres of meadow, 1000 acres of pasture, 2000 acres of moor, and 2000 acres of furze and heath with the appurtenances, in R. M. H. L. C. H. cum B. T. cum S. M. W. S. H. N. W. H. T. L. P. W. O. P. M. B. E. juxta C. B. N. in L. P. S. N. cum S. B. in D. B. W. and S. with the appurtenances, which they claim to be their right and inheritance, and into which the said *Thomas Hesketh* hath not entry, unless after the disseisin which *Hugh Hunt* thereof unjustly, and without judgment, hath made to the aforesaid *Thomas Legh* and *Alexander Rigby*, within 90 years now last past, as they say, and whereof they complain that the said *Thomas Hesketh* deforces them. And unless he shall do so, and if the said *Thomas Legh* and *Alexander* shall make you secure of prosecuting their claim, then summon by good summoners the said *Thomas Hesketh*, that he be before our justices at *Lancaster*, on the first day of the next general session of the assizes to be holden there, to shew wherefore he hath not done it; and have you there the summoners and

HESKETH v. this writ. Witness ourself at *Lancaster*, the 4th day of
LEE & al'. *August*, in the 13th year of our reign. *Otway*. For 30*l.* paid
 into hanaper by *John Otway*, esq. for a fine of the within-
 written, who affirms that the tenements within-written do
 not exceed the value of 300*l.* a year.—Pledges of prosecution,
John Doe and *Richard Roe*.—Summoners, *John Den* and
Richard Fen.

Sir *George Middleton*, knt. and bart. sheriff.

Pleas at *Lancaster* of the session holden there on *Friday*
 the 30th day of *August*, in the 13th year of the reign of
Charles the 2d, by the grace of God, of *England, Scotland,*
France, and *Ireland*, king, defender of the faith, &c. before
 Sir *Christopher Turner*, knt. one of the barons of the exche-
 quer of our lord the king, and Sir *Robert Bernard*, knt.
 serjeant at law, justices of our said lord the king at *Lancaster*.
 Roll. 7.

Licence under
 the king's privy
 seal to an infant
 to suffer a reco-
 very.

Our lord the king has sent, to our justices at *Lancaster*, his
 letters sealed under the privy seal of our said lord the king in
 these words: *Charles* the 2d, by the grace of God, king of
England, Scotland, France, and *Ireland*, defender of the faith,
 &c. to our trusty and well beloved Sir *Christopher Turner*, knt.
 chief justice of the common pleas for the county palatine of
Lancaster, and Sir *Robert Bernard*, knt. justice of our said court
 of common pleas, and to our chief justice and other justices of
 the same court for the time being, and to all other our officers
 and ministers of the same court, greeting. Whereas *Thomas*
Hesketh an infant, and *Lucy Molyneux* his mother, and guar-
 dian, by their humble petition to us exhibited, have shewn
 unto us, that about the year of our Lord God 1641, there was
 a marriage agreed upon between *Robert Hesketh* the petitioner
Thomas's late father, and the petitioner *Lucy*, which was ac-
 cordingly had and solemnized, and that, in pursuance of the
 said agreement, *Robert Hesketh* the petitioner *Thomas's* late
 grandfather, and *Robert Hesketh* the petitioner *Thomas's* late
 father, did by indenture dated the 9th day of *November* 1641,
 for the settling of a jointure upon the petitioner *Lucy*, cove-
 nant to settle all their manors, messuages, land, tenements,
 hereditaments and premises, lying within the county palatine
 of *Lancaster*, to the uses in the indenture named; that after-
 wards it was agreed to settle the same by act of parliament,
 and to that end and purpose a bill was brought into the par-
 liament then sitting, but the late differences and distractions

falling out, it was not proceeded in, and thereupon the said of *HESKETH v. LEE & al.* petitioner *Thomas's* late father did by indenture dated the 22d day of *October* 1647, covenant that he would with all speed settle the said manors, messuages, land and tenements to the uses in the said indenture mentioned, and in pursuance of the said covenant did by his indenture dated the 14th day of *February* in the year of our Lord God 1649, covenant with *Richard Haworth* and *William Halsall* that, at the then next assizes to be holden at *Lancaster*, he would suffer a recovery of several of the manors, houses and demesne lands to the uses in the said indenture dated the 22d day of *October*, in the year of our Lord 1647; and at some other assizes following would suffer another recovery of all the tenements, parcel of the said manors, to such uses as in the aforesaid indenture is mentioned. And that in pursuance thereof a recovery was executed of the said manors, houses and demesne lands, but before the 2d assizes following the said *Robert Hesketh* the petitioner *Thomas's* late father died, and that by reason thereof one part of the petitioner *Thomas's* estate stands settled and another not, and part of the petitioner *Lucy's* jointure is assured to her and the other not, so that the rest and the residue of the said manors, messuages, lands and tenements cannot be perfectly settled and assured according to the aforesaid covenants and agreements, but by a recovery to be had and suffered by the said *Thomas Hesketh* who is within age; the said petitioners have therefore humbly prayed, that we would be graciously pleased, in a case of this nature, and of so great importance, to give you authority and warrant for suffering and passing of a recovery of that part of the petitioner's estate which is yet unsettled, to the end that the same may be settled according to the covenants and agreements aforesaid: know ye therefore that we, favouring the petitioners in this their so just and humble request, are graciously pleased, for the reasons expressed in the petition, to condescend, that the said *Thomas Hesketh* may either in person, or by his able and sufficient guardian, or prochein-amie, suffer such a recovery, of all and singular the said premises in the said petition mentioned which were not formerly settled, as thereby is desired, notwithstanding the said *Thomas Hesketh* hath not accomplished his full age of 21 years, the same being the only cause alleged to prevent the doing thereof, which otherwise might be done, without this our special warrant, in the ordinary course of legal proceedings; and therefore we do by these presents assent and

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give full power and authority unto you our said chief justice, and the rest of the justices of our said court of common pleas, holden for the said county palatine of *Lancaster* now being, and to the chief justice of our said court, and the rest of the justices of the said court for the time being, that you and either and every of you do allow and permit the said petitioner *Thomas Hesketh*, either by himself in person, or by his able and sufficient guardian or prochein-amie, to suffer a common recovery as tenant or vouchee, and to proceed therein with effect according to the course of law in that case used and provided, any thing whatsoever to the contrary thereof in anywise notwithstanding; and these presents, or the enrolment thereof, shall be unto you our said chief justice, and the rest of the justices before named, and to our chief justice and other justices of our said court for the time being, and to all others whom it may concern, a sufficient warrant for doing, effecting and allowing of all and singular the premises, according to our pleasure herein declared, and the true intent and meaning of these presents. Given under our private signet at our court at *Whitehall*, the 31st day of *July*, in the 13th year of our reign, and in the year of our Lord 1661.

A recovery with
single voucher.

Count against
tenant in tail,

Lancashire, to wit. It is granted by the court here, that *John Molineux*, esq. shall sue for *Thomas Hesketh*, esq. who is within age, as the guardian of the said *Thomas*, against *Thomas Lee*, esq. and *Alexander Rigby*, esq. in a plea of land.

Lancashire, to wit. *Thomas Lee* and *Alexander Rigby*, esquires, in their proper persons, demand against *Thomas Hesketh*, esq. the manors of R. M. H. L. C. H. cum B. T. cum S. M. W. S. H. and N. W. with the appurtenances, and 323 messuages, 4 mills, 1000 acres of land, 267 acres of meadow, 1000 acres of pasture, 2000 acres of moor, and 2000 acres of furze and heath, with the appurtenances in R. M. H. L. C. H. cum B. T. cum S. M. W. S. H. N. W. H. T. L. P. W. O. P. H. M. B. E. juxta C. B. N. in L. P. S. N. cum S. B. in D. B. W. and S. with the appurtenances, as their right of inheritance, and into which the said *Thomas* hath not entry until after the disseisin which *Hugh Hunt* thereof unjustly and without judgment hath made to the aforesaid *Thomas Lee* and *Alexander*, within 30 years now last past, &c. and whereof they say that they themselves were seised of the manors and tenements aforesaid with the appurtenances in their demesne as of fee and right, in the time of peace, in the time of our lord the new king, by taking the esplees

thereof to the value, &c. and into which, &c. and thereof they bring suit, &c.

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And the said *Thomas Hesketh*, who is within age, by *John Molineux*, esq. who is admitted by the court here to sue for the said *Thomas*, as the guardian of the said *Thomas* in the plea aforesaid, in his proper person comes and defends his right when, &c. and vouches thereof to warranty *Thomas Barton*, who is present here in court in his proper person, and freely warrants the manors and tenements aforesaid with the appurtenances to him, &c. And thereupon the said *Thomas Lee* and *Alexander* demand against the said *Thomas Barton*, tenant by warranty, the manors and tenements aforesaid with the appurtenances in form aforesaid, &c. and whereof they say that they themselves were seised of the manors and tenements aforesaid with the appurtenances in their demesne as of fee and right, in time of peace, in the time of our lord the king, by taking the esplees thereof to the value, &c. and into which, &c. and thereof they bring suit, &c.

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who vouches
the common
vouches.

And the said *Thomas Barton* tenant by his warranty defends his right when, &c. and says that the said *Hugh* did not disseise the said *Thomas Lee* and *Alexander* of the manors and tenements aforesaid with the appurtenances, as the said *Thomas Lee* and *Alexander* by their writ and declaration aforesaid above suppose, and of this he puts himself upon the country, &c. And the said *Thomas Lee* and *Alexander* pray leave to imparl thereto, and they have it, &c. And afterwards the said *Thomas Lee* and *Alexander* come again into court in this same session in their proper persons, and the said *Thomas Barton*, although solemnly called, doth not come, but has departed in contempt of the court and made default. Therefore it is considered that *Thomas Lee* and *Alexander* recover their seisin against the said *Thomas Hesketh* of the manors and tenements aforesaid with the appurtenances, and that the said *Thomas Hesketh* have of the land of the said *Thomas Barton* to the value &c. And the said *Thomas Barton* in mercy, &c. And therefore the said *Thomas Lee* and *Alexander* pray the writ of our lord the now king, to be directed to the sheriff of the said county, to cause them to have full seisin of the manors and tenements aforesaid with the appurtenances, and it is granted to them returnable here on *Friday* next following in this same session, &c. At which day come here the said *Thomas Lee* and *Alexander* in their proper persons; and the sheriff, to wit, *Sir George Middleton*, kn^t, and bart., returns

HESKETH v. LEE & al'. that he, by virtue of the writ aforesaid to him directed, on *Thursday* the 5th day of *September* last past, caused the said *Thomas Lee* and *Alexander* to have full seisin of the manors and tenements aforesaid with the appurtenances, as by the said writ he was commanded, &c.

Writ of seisin.

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Charles the 2d, by the grace of God, of *England, Scotland, France* and *Ireland*, king, defender of the faith, &c. to the sheriff of *Lancashire* greeting: Know that *Thomas Lee* and *Alexander Rigby*, esquires, in our court before our justices at *Lancaster*, recovered their seisin against *Thomas Hesketh*, esq. of the manors of R. M. H. L. C. H. cum B. T. cum S. M. W. S. H. and N. W. with the appurtenances, and 323 messuages, 4 mills, 1000 acres of land, 267 acres of meadow, 1000 acres of pasture, and 2000 acres of moor, and 2000 acres of furze and heath, with the appurtenances in R. M. H. L. C. H. cum B. T. cum S. M. W. S. H. N. W. H. T. L. P. W. O. P. H. M. B. E. juxta C. B. N. in L. P. S. N. cum S. B. in D. B. W. and S. with the appurtenances in your county, by our writ of entry *sur disseisin* in the post. And therefore we command you, that without delay you cause the said *Thomas Lee* and *Alexander* to have full seisin of the manors and tenements aforesaid with the appurtenances; and in what manner you shall execute this precept you make known to our justices at *Lancaster* on *Friday* next following; and have there this writ. Witness *C. Turner* at *Lancaster*, the first day of *September*, in the 23d year of our reign. *Elwes.*

Answer of the sheriff.

By virtue of this writ to be directed, I have caused the within-named *Thomas Lee* and *Alexander* to have full seisin of the manors and tenements within written, on the 5th day of *September*, in the 13th year of the reign of our lord the king within written, as within I am commanded. Sir *George Middleton*, knt. and bart. sheriff.

Assignment of errors (post. 101. p.)

General error. (post. 101. q.)

Afterwards, to wit, on *Wednesday* next after five weeks of *Easter* in this same term, before our lord the king at *Westminster*, comes the said *Thomas Hesketh* by *Nicholas Harding* his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given, was given for the said *Thomas Lee* and *Alexander Rigby* against the said *Thomas Hesketh*, whereas by the law of this realm of *England*, the said judgment ought to have been given

for the said *Thomas Hesketh* against the said *Thomas Lee* and *Alexander Rigby*; therefore in that there is manifest error.

There is also error in this, that by the said record it appears, that the said *Thomas Hesketh* is admitted by the court to *prosecute* by *John Molineux* his guardian, whereas in truth the said *Thomas Hesketh* was *tenant* in the plea aforesaid; and therefore in that there is manifest error.

There is also error in this, that no appearance is entered upon the said record for the said *Thomas Hesketh* by his guardian, and therefore in that there is manifest error.

There is also error in this, namely, that it does not appear by the said record, whether the said *Thomas Hesketh* ever appeared and vouched to warranty the said *Thomas Barton* vouchee to warranty mentioned in the said record; but the said appearance, and also the vouching to warranty of the said *Thomas Barton*, is altogether uncertain and insufficient, and therefore in that there is manifest error, &c. And the said *Thomas Hesketh* prays the writ of our lord the now king to warn the said *Thomas* and *Alexander* to be before our lord the king, to hear the record and proceedings aforesaid, and it is granted to him, &c. by which it is commanded to the chancellor of the county palatine of *Lancaster*, or to his deputy there, that he make his mandate to the sheriff of the county palatine aforesaid, that by good and lawful men of his bailiwick, he make known to the said *Thomas Lee* and *Alexander Rigby*, that they be before our lord the king in three weeks from the day of the *Holy Trinity* wheresoever, &c. to hear the record and proceedings aforesaid, if, &c. and further to do and receive what the said court of our said lord the king shall consider of them in this behalf; the same day is given to the said *Thomas Hesketh*, &c. At which day before our lord the king at *Westminster* comes the said *Thomas Hesketh* by his attorney aforesaid; and the chancellor of the county palatine aforesaid, to wit, Sir *Thomas Ingram* knt. returns that he, by virtue of the writ of our lord the king to him thereof directed, by the writ of our lord the king under the seal of the county palatine aforesaid, had made his mandate to the sheriff of the said county, as he was commanded; which said sheriff, to wit, *Thomas Greenhalgh* esq. answered, that by virtue of the said writ to him directed, he had, by E. B. and J. D., good and lawful men of his bailiwick, caused it to be made known to the within named *Thomas Lee* and *Alexander Rigby* that they be before our lord the king at the day and place within

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Special errors that T. H. is admitted to prosecute by his guardian, though he was tenant. (post. 101. q.)

No appearance entered on record.

Nor does it appear that T. H. vouched to warranty the common vouchee.

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Scire facias ad audiendum errores. (post. 101.) r.

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written, to do and receive what the court of our lord the king within written should consider, as by the said writ to him directed he was commanded. Which said *Thomas Lee* and *Alexander Rigby*, according to the warning to them in that behalf given, come by *Seth Powell* their attorney; whereupon the said *Thomas Hesketh* as before, saith, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid there is manifest error, by alleging the said errors by him in form aforesaid alleged; and he prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, &c., and that the said *Thomas Lee* and *Alexander Rigby* may rejoin to the errors aforesaid, and that the court of our lord the king may proceed to examine as well the record and proceedings aforesaid, as the said matters above assigned for error.

Joinder in error.

And the said *Thomas Lee* and *Alexander Rigby* say, that there is no error either on the record and proceedings aforesaid, or in giving the judgment aforesaid; and they likewise pray that the court of our lord the king may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid may in all things be affirmed. But because the court of our lord the king here is not yet advised what judgment to give of and concerning the premises, a day is therefore given to the parties aforesaid before our lord the king until three weeks from the day of *Easter* wheresoever, &c. to hear their judgment thereon; for that the court of our said lord the king here is not yet advised thereof, &c. At which day, before our lord the king at *Westminster* come the parties aforesaid by their attornies aforesaid, and thereupon the said *Thomas Hesketh* likewise prays another writ of our said lord the king of *scire facias*, to be directed to the chancellor of the county palatine of *Lancaster*, or his deputy there in that behalf, to warn the tenants of all the manors, lands and tenements above mentioned, to be before our lord the king wheresoever, &c. to hear the record and process aforesaid, and it is likewise granted to him, &c.; by which it is commanded to the chancellor of the county palatine of *Lancaster* aforesaid, or to his deputy in that behalf, that, by the writ of our lord the king in due manner made under the seal of the county

*Curia advisare
vult.*

Plaintiff prays a
scire facias to the
terre-tenants.

palatine aforesaid, and to be directed to the sheriff of the said county, he make his mandate to the said sheriff, that by good, &c. of his bailiwick, he make known to the aforesaid tenants, that they be before our said lord the king on the octave of St. *Hilary* wheresoever, &c. to hear the record and proceedings aforesaid, if, &c.; and further, &c. the same day is given to the said *Thomas Hesketh*, &c. At which day, before our lord the king at *Westminster* comes the said *Thomas Hesketh* by his attorney aforesaid; and the said Sir *Thomas Ingram*, chancellor of the county palatine aforesaid, returns, that he by virtue of the said writ to him in form aforesaid directed and delivered, by the writ of our lord the king, under the seal of the county aforesaid, had made his mandate to the sheriff of the said county as he was above commanded; which said sheriff, to wit, *Christopher Banestre* esq. answered him, that by virtue of the said writ to him directed, he had by E. B. I. D. W. H. and R. H. good and lawful men of his bailiwick, caused it to be made known to *John Molineux* esq. and *Lucy* his wife, tenants of the said several manors of L. C. M. H. cum B. T. cum S. W. and H. with the appurtenances, and of 172 messuages, with the appurtenances in L. C. M. H. cum B. T. cum S. W. H. H. H. and P. aforesaid; and also to *Ralph Egerton* gent. tenant of one messuage, with the appurtenances in H. cum B.; to *Thomas Harsnepp*, tenant of one messuage, with the appurtenances in M.; to *Richard Sands* tenant of one messuage with the appurtenances in H.; to *Henry Sutch* tenant of one messuage with the appurtenances in H.; to *Egeon Taylor* and *Thomas Walton* tenants of two messuages with the appurtenances in H. aforesaid; to *William Mosse* tenant of one messuage with the appurtenances in L.; to *Henry Nelson* tenant of one messuage with the appurtenances in C. aforesaid; to *William Bandy* tenant of one messuage with the appurtenances in T. cum S. aforesaid; to *Richard Sands* tenant of one messuage with the appurtenances in H.; to *John Barton* tenant of one messuage with the appurtenances in P. aforesaid; to *John Stater* tenant of one messuage with the appurtenances in P.; to *Nicholas Massom* tenant of one messuage with the appurtenances in R.; and to *Richard Bannister* tenant of one messuage with the appurtenances in W.; that they be before our said lord the king on the octave of St. *Hilary* wheresoever, &c. to hear the record and proceedings aforesaid, if it shall seem expedient to them, and further to do and receive in manner and form

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HESKETH v. LEE & al'. as above he was commanded; and that there are no other or more tenants of any manors, lands, or tenements in his bailiwick, to whom he can cause it to be made known (2).

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Two of the
terre-tenants
appear and join
in error.

And the said *John Molineux* esq. and *Lucy* his wife, being solemnly called on the 4th day of the plea, likewise come by *Seth Powell* their attorney; and the said other terre-tenants

(2) It has been already observed (ante, 71. note 4.) that, though a *scire facias* against the terre-tenants upon a writ of error to reverse a fine or recovery be discretionary, yet, as the constant and uniform practice of the court has been to sue it out, it is not now to be departed from. 3 Mod. 119. *Kingston v. Herbert*. Carth. 111. Earl of *Pembroke's* case. S. C. Skin. 273. 1 P. 1 Burr. 359, 360. *Hall v. Woodcock*. Ibid. 412. *Sheepshanks v. Lucas*. And in Dy. 321. a. which was a writ of error in the king's bench to reverse a fine levied in *Chester*, it is said that some of the judges of both benches thought, that the most perfect and sure way would be, to award a *scire facias* against the terre-tenant, before the court proceeded to the examination of the errors: for perhaps he may have something to plead in bar of the writ of error, such as a release and the like, which would relieve the court from the necessity of examining the errors at all. And if they should be of opinion that the judgment ought to be reversed against the party or privy, still the plaintiff cannot be restored to all that he has lost, until the terre-tenant be ousted by a *scire facias*. For if he is otherwise ousted, he may have an *assize*, and besides, it would be disgraceful to the court, if it were to adjudge the plaintiff to be restored, and yet not be able to execute their judgment until the terre-tenant were made privy; and therefore, agreeably to this opinion, a *scire facias* was afterwards awarded against the terre-tenant, and he was

returned warned. See Cro. Eliz. 739. *Holland v. Dauntzey*. Moor. 622. *Holland v. Jackson*.

By statute 23 Eliz. c. 3. s. 2. it is enacted that no recovery shall be reversed for rature, interlining, misentering of a warrant of attorney, or not returning of the sheriff, or other want of form in words, and not in matter of substance. And by stat. 10 & 11 W. 3. c. 14. it is enacted, that no fine, or common recovery, shall be reversed, or avoided for any error or defect therein, unless the writ of error, or suit for reversing such fine, or recovery, be brought and prosecuted with effect within 20 years after such fine levied, or recovery suffered. And by the 2d section, the rights of infants, femmes-covert, persons *non compos*, in prison, or beyond sea, are saved, so as they bring their writ of error within 5 years after their disabilities are removed.

It has been holden, that by this statute a writ of error must be brought within 20 years *after the recovery has been suffered*, and not within 20 years *after the title has accrued*; for suffering the recovery is the time from which the 20 years are counted. 2 Str. 1257. *Lloyd v. Vaughan*.

But sometimes the court of common pleas will upon application order a common recovery to be amended; for as it is become now a common assurance, it is much favoured, and the court will always amend it, whenever it can be done consistently with the rules of law, and provided there be something to amend it by. Willes's Rep. 563. *Wynne*

being likewise solemnly called on the 4th day of the plea, do ^{HESKETH v. LEE & al'.} not come; whereupon the said *Thomas Hesketh*, as before, says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid there is manifest error, by

v. Thomas. And length of time is not of itself an answer to the application, for recoveries have been frequently amended forty years or more after they were suffered. 7 Mod. 497. *Wynne v. Wynne.* But the court requires the best evidence that can be adduced to shew that the defect or omission, which is sought to be supplied, originated in mistake, and that the amendment proposed is agreeable to the intention of the parties when the recovery was suffered. Therefore if parcels, or a parish, or a vill, are omitted in a recovery, or there is a mistake in the description of the premises, or in the name of the parties, the court will not allow an amendment of these particulars merely on an affidavit of the facts, because that is not the best evidence; but the deed to lead the uses of the recovery must also be produced; for that is the best evidence of the intention of the parties: and it must appear *on the face of the deed*, that there is sufficient ground for the amendment. 1 H. Black. 73. *Pearson v. Pearson.* Thus, where the deed to lead the uses described the parcels to be situate "in the lordship of *Myton* in the county of *York*, or in "the town and county of *Hull*, lately "purchased of *Thomas Yates*;" and it was verified by affidavit that the lands intended to pass were purchased of *Thomas Yates*, being in the township of *Myton* in the town and county of *King-*

ston upon Hull; but the recovery was, of lands "in the town of *Kingston upon Hull*:" it was ordered to be amended by inserting the words "in *Myton*," and the words, "*and county*," and so making the description of the lands to be "in *Myton* in the town and "county of *Kingston upon Hull*," though the recovery had been suffered two and twenty years before, and the vouchee was then dead. 2 Black. Rep. 1065. *Watson v. Cox.* [c] So where the deed to lead the uses mentioned "all "the vouchee's lands in *Aldenham*, or "elsewhere, in the county of *Kent*; in "the occupation of *Robert Goddard*." *Robert Goddard* rented one entire farm of the vouchee, all sworn to be intended to pass by the recovery, being principally in the parish of *Aldenham*, but part thereof lay in the parish of *Mersham*, which was not known to the parties when the recovery was suffered. The court, after taking a day to consider of it, allowed the recovery to be amended, by inserting the word "*Mersham*." 2 Black. Rep. 747. *Henzel v. Lodge.* 3 Wils. 154. S. C. In like manner the court has enlarged the number of acres in a recovery by allowing the writ of entry, mittimus, transcript, and recovery, to be amended by the deed to lead the uses, by inserting *fifty* acres instead of *thirty*, being the number of acres sworn to be intended to pass, and the deed compre-

[c] In 1 Taunt. 538. *Wainwright v. Seagrave*, the court held that it could not be permitted to suffer a recovery of lands in one of two counties in the alternative; for that a recovery was ori-

ginally a possessory action and local. If part of the premises were situate in each county, or if the parties did not know in which county they lay, the only expedient was to have two recoveries.

HESKETH v. LEE & al'. alleging the errors aforesaid above in form aforesaid alleged; and he prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for

hending a much larger number. It is true lord chief justice *Eyre* felt some difficulty in allowing the mistake to be amended in the writ of entry on the authority of Lord *Pembroke's* case; 1 Salk. 52.; but Mr. Justice *Heath* said that during the whole time he had sat on the bench, it had been the constant practice to amend recoveries by the deed to lead the uses. 1 Bos. & Pull. 137. *Cross v. Grey*. However, to prevent any fraud on the alienation-office by inserting only a few acres in the recovery at first, and so paying but a small fine, and afterwards applying to the court for leave to insert a greater number, the court, before they allow the amendment, take care that the parties shall duly compound at the alienation-office for the additional number of acres. So the writ of entry, and subsequent proceedings in a recovery have been allowed to be amended, by inserting the word, all and all manner of *tithes* whatsoever yearly arising from and out of the said premises therein, the deed leading the uses comprehending all the lands, and *hereditaments* which the vouchee was seised of in tail by virtue of the will of A. B., and it being sworn that the tithes were parcel of the premises so devised, and were intended to be comprised in the recovery. 2 Bos. & Pull. 578. *Dowse v. Lloyd*, and 580. note (a) *Milbanke v. Jolliffe*. So where a recovery was agreed to be suffered of lands in N. L. and M., but N. was totally omitted, the recovery was allowed to be amended by the deed to lead the uses. Fig. 172. So a recovery suffered nine years before was ordered to be amended, by putting the word "*Trull*," the name of a vill, into its proper place,

according to the deed of uses. *Trull* had by mistake been put into the recovery as an advowson, not as a vill where lands lay. And the court said that the principle upon which they went was the statute 8 H. 6. c. 12. to amend the misprision of the clerk. A *præcipe* is the cursor's instruction for an original writ; a deed of uses is the clerk's instruction for a recovery. This *præcipe* and this deed are the things to amend by. Barnes, 21. *Loggin v. Rawlins*. So the christian name of the vouchee has been altered in a recovery by the deed to lead the uses of it. 2 Black. Rep. 1230. *Mayre v. Coulthard*. So where A. was demandant in the recovery, and B. tenant, but by the deed to lead the uses, B. was to have been demandant, and A. tenant; the names were transposed accordingly. Barnes, 24. *Lord v. Briscoe*. The court will also amend any informality in the entering of the judgment in a recovery, it being their own act; as by striking out the words "it is adjudged," and inserting the words "it is considered." Barnes, 23. *Ring v. Bold*. Ibid. 22. *Tarrant v. Randal*. Amendments are also allowed in the writ of seisin, and the return thereof. Thus where a writ of seisin was rightly directed to the sheriffs of the city of York, but not returned in the name of any sheriff, though a mistaken return in the singular, instead of the plural number, was indorsed on the writ; the prayer of seisin, and return of the writ, were ordered to be first amended, and then the roll and exemplification accordingly. Barnes, 23. *Witton v. East*. So the return of the writ of seisin was amended in the year of the king's reign. 2 Wils. 2. *Watson v. Lockley*. So where

nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, &c.

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And because the court of our said lord the king is not yet advised what judgment to give of and concerning the premises, a further day is therefore given to the parties aforesaid, before our lord the king, until three weeks from the day of *Easter*, wheresoever, &c. to hear their judgment of and concerning the premises; for that the court of our said lord the king here is not yet advised thereof. At which day before our lord the king at *Westminster* come the parties aforesaid by their attornies aforesaid, whereupon as well the record and

Curia advisare
vult.

Judgment
affirmed.

a recovery is erroneous, because no writ of seisin is awarded, nor the judgment executed by a writ of seisin returned on the roll, the court of common pleas will, after a writ of error is brought to reverse the recovery for that error, rectify the defect in the record, by ordering a writ of seisin to be awarded on the roll, and return executed; for no writ of seisin is ever in fact executed. 5 Term Rep. 179, 180. *Goodright v. Rigby*, per Lord Kenyon.

But no amendment will be allowed in the description of the estates comprehended in a recovery, where the recovery, as it stands, has lands of the vouchee to operate upon. As where a recovery was suffered of premises in the county of the city of *Litchfield*, and by the deed to lead the uses it appeared that the greater part of the premises intended to pass by the recovery were in the county of *Stafford*, but a small part of them also lay in the county of the city of *Litchfield*; the court would not suffer the recovery to be amended by striking out the words "city of *Litchfield*," and inserting the words "county of *Stafford*;" for this would in effect be annulling a valid recovery in the city of *Litchfield* which had operated upon lands there, and substituting in its stead a recovery in the county of *Stafford*. 2 Black. Rep. 874. *Acton v. Baldwin*. Whenever there is a mis-

take either in the *teste* or return of the writ of entry, owing to the *misprision* or *negligence* of the clerk, it is amendable by statute 8 H. 6. c. 12.; but where the mistake is occasioned by the *nescience* or *ignorance* of the clerk, it is not amendable by that statute; this distinction is warranted by *Blackmore's* case. 8 Rep. 159 b. 160 a. Therefore where the *teste* is void, as when it is made on a *Sunday*, or in vacation time, it is amendable as the plain misprision of the clerk; but where there is an impossible *teste*, as if the writ of entry bears *teste* after the return, the *teste* is not amendable; though *Gage's* case, 5 Rep. 45 b. is to the contrary; but that case has often been denied. 2 Ld. Raym. 1066. *Queen v. Tuchin*. 1 Salk. 52. *Lord Pembroke v. Lord Jeffereys*; in which last case a writ of covenant to levy a fine was tested six months after the *dedimus* for the caption, but it did not appear whether the *teste* was before the return or after; and Lord *Holt* certified the opinion of the judges in the house of lords, that the writ was not amendable in that instance. However, at all events, neither the *teste*, nor return of the writ of entry is amendable, where it is not the misprision of the clerk, unless there is something to amend it by. Willes's Rep. 563. *Wynne v. Thomas*.

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proceedings aforesaid and the judgment given thereupon, as the matters aforesaid above for error assigned, being seen, and by the court of our lord the king here more fully understood, and diligently examined, because it appears to the court of our lord the king here, that the said record is in nothing vicious and defective, and that there is no error in the said record; therefore it is considered that the judgment aforesaid be in all things affirmed, and stand in full force and effect, the several causes and matters for errors assigned notwithstanding, &c.

Case 15.

Hesketh *versus* Lee and al'.

Pasch. 21 Car. II. Regis. Rot. 408.

5 C. 1 Sid. 446.
1 Vent. 73.
2 Keb. 627.
1 Mod. 48.
If a guardian
be admitted to
sue for an in-
fant tenant or
defendant, it is
not any error.

ERROR by *Hesketh* against *Lee* and *Rigby* to reverse a judgment in a common recovery in the county palatine of *Lancaster*, in which *Lee* and *Rigby* were demandants against *Hesketh* then an infant tenant, who appeared by guardian and vouched the common vouchee, upon which the recovery was had: and the error insisted upon was, that it appears by the record that the now plaintiff, who was then tenant, was an infant within the age of 21 years. And the entry of his admission by his guardian is in this manner, namely, "It is granted by the court here that *John Molineux* shall sue for *Thomas Hesketh*, esq. who is within age, as guardian of the said *Thomas*, against *Thomas Lee*, esq. and *Alexander Rigby*, esq. in a plea of land." And in the body of the common recovery immediately after the end of the count, the entry is in this manner, namely, "And the said *Thomas Hesketh*, who is within age, by *John Molineux* esq. who is admitted by the court to sue for the said *Thomas* as the guardian of the said *Thomas* in the plea aforesaid, in his proper person comes and defends his right when, &c. and vouches thereof to warranty, &c." Which was strongly urged by *Weston of Gray's Inn* to be error, for it ought to have been, that the guardian was admitted to defend for the infant tenant, and not to sue for him, because the infant was tenant and so defendant, and therefore did not prosecute the suit, but was prosecuted, wherefore he ought to have a guardian to defend him; and there was no necessity to have any person to prosecute or sue, where there was no suit on the part of the infant to be followed or prosecuted. And he said this entry is agreeable to,

and consistent with law, where the infant was demandant, but not consonant to law, or according to precedents, where the infant was tenant as here. And he further said that though common recoveries, being amicable actions for common assurances, are much favoured in law, yet they are real actions, and are of the same nature with an adversary action upon a writ of entry *sur disseisin en le post*, and therefore ought to be guided by the same rules that govern them.* And he cited the case of *Simpson v. Jackson*†, where an infant defendant was admitted by *prochein amy ad prosequendum* in an action of ejectment, and it was adjudged to be error, and therefore the judgment was reversed; which in effect is the same case with the case at bar. He also took another exception, that upon the record the infant was admitted by guardian, and yet the infant appeared *in proper person*, whereas he ought to have appeared by guardian. For the entry in the body of the record is, that the infant, “by *John Molineux*, esq. who is admitted by the court here to sue for the said *Thomas*, (namely the infant,) as guardian of the said *Thomas*, (namely the infant,) in the plea aforesaid, *in his proper person* comes, &c.” as before: So it says that the infant came in his proper person, though he was admitted by guardian, and therefore the judgment erroneous.

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* Ante, 42.
note (7).

† Cro. Jac. 640.

Sed non allocatur: for by the court as to the first exception, the admission by guardian to sue, &c. was good enough, because the words “to sue” were sufficiently significant of a defendant, for “to sue” is nothing more than “to take care of, or take upon one, the defence or tuition of the cause for the infant, or on his behalf.” And these words “to sue” may be applied indifferently either to the demandant or plaintiff, or to the tenant or defendant, for the suit of one party or of the other must be followed. And the words “to sue” not only signify “to prosecute,” but also “to defend,” or to do something which the law requires for the better prosecution or defence of the cause in which the guardian is admitted. And as to the second exception, the court said it is plain by the record that the infant appeared by his guardian, and then the words, “in his proper person,” are only superfluous and idle, and will not hurt the record which was perfect before, especially in a common recovery which is so greatly favoured in law. But the court said that the words “in his proper person” may well stand with the precedent matter in good sense; for the sense is, that the infant comes by his guardian in his proper person, that is, that the infant

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HESKETH v. LEE & al'. comes by his guardian, which guardian *was in his proper person*, and so the words "in his proper person" relate to the guardian and not to the infant, as *Weston* would have it; and by this exposition the whole sentence stands well together, and is all good sense without striking out, or rejecting any word; and the best construction is to be made to support a judgment. And for these reasons the judgment was affirmed by the whole court (3).

(3) It was long doubted, whether a common recovery suffered by an infant by guardian was good; and, in 10 Rep. 43 a. *Mary Portington's* case, the better opinion seems to have been that it was erroneous; but it now appears to be settled, that if an infant appear by guardian and vouch the common vouchee, and so suffer a recovery, it cannot be reversed by error. And the reason assigned is, that if the recovery be to the prejudice of the infant, he may have remedy against his guardian for it. Cro. Car. 307. *Earl of Newport v. Mildmay*. S. C. Sir W. Jones, 318. S. P. Hob. 196. *Blount's* case. 1. Roll. Abr. 731. (G.) pl. 1. 1 Sid. 321. *Raby v. Robinson*. Fig. 64. 2 Bac. Abr. 543. 3 Bac. Abr. 135. Cro. Eliz. 471. *Stapleton's* case, to which may be added the present case. Therefore when an infant intended to suffer a common recovery, the practice formerly was for him and his guardian to petition the king to grant letters under the privy seal, as in this case, to the judges of the court where the recovery was to be suffered, directing them to permit such infant to suffer a common recovery. But it was still in the discretion of the judges, whether they would permit the infant to suffer it or not, in the exercise of which they were governed by the circumstances of the case. If upon examination it was either found to be necessary, or for the advantage of the infant, that he should suffer a common recovery, the judges admitted persons of known integrity and fortune to ap-

pear as guardians to the infant, and to suffer a recovery for him in court. Hob. 196. *Blount's* case. 1 Vern. 461. Sir *H. Mackworth's* case. But if the reasons for the application did not appear to the judges to be sufficient, they would not permit the recovery to be suffered. 1 Ld. Raym. 113. *Hulbert v. Watts*. 2 Salk. 567. Sir *John St. Alban's* case. But common recoveries suffered by privy seal are now disused, and private acts of parliament universally substituted in their stead. When an infant is permitted to suffer a recovery with double voucher, which is now the common course, he must make a tenant to the præcipe by *feoffment*, and give livery of seisin *in person*, by which means the feoffment is only *voidable*, whereas, if the infant appointed an attorney to give livery of seisin for him, the feoffment would be absolutely *void*. Perk. s. 12, 13. 3 Burr. 1804. *Zouch v. Parsons*. Or he may make a tenant to the præcipe *by fine*. Fig. 65.

If an infant suffer a common recovery *in person* it is erroneous, and he may reverse it by a writ of error; but the writ must be brought in this case, as in that of a fine, *during his minority*: for the fact is to be tried by the inspection of the judges; but after his full age it is too late to reverse it by writ of error, or otherwise howsoever; for the recovery or fine then becomes obligatory and unavoidable for ever. Co. Litt. 380. b. 1 Sid. 321. *Raby v. Robinson*. S. C. 1 Lev. 142. Fig. 166. 1 Mod. 49. *Heskett v. Lee*. 2 Bac. Abr. 543. 3 Bac.

Abr. 186. So if an infant suffer a recovery or levy a fine, he is by law enabled to lead or declare the uses thereof: and if he do not reverse the recovery or fine during his non-age, the declaration of uses will stand good for ever; for, though the deed to lead or declare the uses of the fine or recovery be a matter *in pais*, and all such acts an infant may in general avoid at any time after his full age, if he do not consent, yet being made in pursuance of the recovery or fine, and being a part thereof, it shall likewise stand as long as the fine or recovery remain in force as incident thereto. 2 Rep. 58 a. *Bethwick's case.* 10 Rep. 42 b. *Mary Portington's case.* Hob. 234. Lord *Darcy v. Askwith.* 3 Atk. 710, 711. *Hearle v. Greenbank.* 1 ses. 304, 305. S. C. 3 Bac. Abr. 135. 1 Roll. Abr.

730. (F.) pl. 3. But if an infant suffers a common recovery in which he appears by attorney, he may reverse it at any time after he has attained his full age, because it may be tried by a jury, whether he was an infant or not when he appointed an attorney. For an infant is not presumed to have discretion enough to choose a proper person to be his attorney, and therefore on account of the imbecility of his understanding, the law has put it out of his power to hurt himself; for if he be prejudiced by the recovery, he has not any remedy against his attorney as he may have against his guardian; and therefore his appointment of an attorney is void. 1 Sid. 321, 322. *Raby v. Robinson.* 2 Roll. Abr. 573. pl. 8. 1 Roll. Abr. 755. pl. 6. *Bridg. 73. Holland v. Jackson.* Arg. 5 Mod. 209. *Stokes v. Oliver.*

Chester versus Willan.

Case 16.

Trin. 21 Car. II. Regis. Rot. 498.

ACTION upon the case upon a special issue directed out of chancery, and on a special verdict found at the assizes, the case was this. Three jointenants for life, and one of them seals and delivers a deed to another of the jointenants, in which it is expressed, that he "granted, bargained, sold, assigned, set-over, and confirmed" to the other all the right, estate, title, interest, claim and demand of the grantor, of and to the lands holden in jointure. And the question upon this special verdict was, whether this deed was sufficient to pass the part or share of the jointenant who made the deed, to the other to whom the deed was made or not? And it was adjudged clearly without argument that it was. And *Jones* for the defendant, would have spoken to it, but the court interrupted him, and said it was so clear, that there could be no question about it; and therefore judgment was given for the plaintiff who claimed under the deed.

Note; the word "grant" is of general extent, and may

S. C. 2 Keb. 641.
1 Vent. 78.
Sir T. Raym.,
187.
1 Sid. 452. S. C.
cited 14 Vin.
478.
18 Vin. 313.
If there are
three jointe-
nants for life,
and one of
them by his
deed grants all
his right to the
lands in jointure
to another of
the jointenants,
the deed is suf-
ficient to pass
the estate of him
who made the
deed to the
other.
The legal oper-
ation of the
word "grant."

CHESTER v. WILLAN. amount to a grant, feoffment, gift, lease, release, confirmation, or surrender. Litt. s. 531. Co. Litt. 301. b. 302. a. (1).

Note also; that it was said by the chief justice, that though the jury have found, that he granted, yet the court

(1) And it is in the election of the party to use it to whichever of these purposes he pleases. Co. Litt. 301. b. The chief intent of the parties is *to pass* the estate, and *the method* of doing it ought to be subservient to that end: and though the intent of the grantor is to be regarded *as to what estate* is to pass, *and to whom*, yet it is not to be regarded as to the *manner* of passing it, for of that he is supposed to be ignorant. And it is an established rule, that a deed shall never be laid aside as void, if by any construction it can be made good. Hob. 277. *Earl of Clanrickard's case*. Shep. Touchstone, 82, 83. Therefore where a man seised in fee of a rent granted it by deed to one who was his kinsman, and there was an attornment to the grant, but it was made by a person who was not the real tenant of the land, and therefore void; though the intent appeared that the deed should *operate as a grant at common law with an attornment*, yet since it could not pass that way, it was adjudged that the grant being made to a relation *should operate as a covenant to stand seised*. *Sanders v. Savile*, cited in 3 Lev. 372. So where a man by deed *gives and grants* land to another, and a letter of attorney to make livery is indorsed upon the deed, but no livery happens to be made; yet if this grant be made to a relation, *it shall operate as a covenant to stand seised*; though the letter of attorney, indorsed on the deed for the making of livery, shews the plain intent of the deed and of the parties to have been, that the land should pass by feoffment and livery. 3 Lev. 372. *Osman v. Sheaf*. S. C. Carth. 307. And where a father seised

in fee made a deed to his daughter enrolled within six months, by which, in consideration of natural love, augmentation of her portion, and the preferment of her in marriage, and other good and valuable considerations, he gave, granted, bargained, and sold, aliened, enfeoffed and confirmed unto the daughter and her heirs the said lands, and there was a covenant that after due execution, &c. she should quietly enjoy, and also a clause of warranty, but there was *no money paid*, or any other consideration but what was expressed in the deed; it was held that though the deed could not enure as a *bargain and sale*, *no money* having passed between them, yet it should operate *as a covenant to stand seised*. 1 Vent. 137. *Crossing v. Scudamore*. And where a father, seised in fee of a rent, by indenture, in consideration of affection, and 5*l.* paid, gave, granted, assigned, and transferred the rent to his son and his heirs; it was held, that there being two considerations expressed, affection and money, the deed might operate as a bargain and sale, if enrolled, or as a covenant to stand seised. 3 Lev. 291. *Baker v. Lade*. S. C. 4 Mod. 150. Sty. 204. *Wats v. Dix*. 7 Rep. 40 b. *Bedell's case*. 2 Roll. Abr. 786. (O.) pl. 1. *Tebbe v. Popplethwayte*. So where lands are granted to a man and his heirs with a general warranty against all persons whatsoever, and no livery, or a void livery, is made; still if this grant be made to a relation, it shall operate *as a covenant to stand seised*; though the inserting of the warranty shows the intent to have been, that the lands should pass by way of *feoffment*, in which case the feoffees, if

would adjudge that *he released*, which is the proper conveyance for one jointenant to pass his estate to the other. But if the party in pleading had *pleaded* that he granted, the plea would be bad, for every one must order his plea according to the rules of law (2): but it is otherwise of a *verdict*, because it is the saying of laymen: See Cro. Eliz. * 482. S. C. 6 Rep. 26. where the jury found expressly that J. S. demised for life, but found there was no livery, the court adjudged it was no lease, notwithstanding the former precise words of the verdict, &c. (3)

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WILLAN.

A release is the proper conveyance for one jointenant to pass his estate to the other.
* Sharp v. Sharp.

impleaded, might vouch upon the warranty: whereas it operating by way of use, and a covenant to stand seised, the grantee is in the *post*. and cannot vouch. 1 P. Will. 169. *Tomlinson v. Dighton*. Arg. And where G. S. being seised in fee, in consideration of a marriage to be had between him and A. S., by indenture between him of the one part, and the said A. S. and W. S. of the other part, did give, grant, enfeoff, aliene and confirm the lands to A. S. and W. S. and their assigns, to hold to A. S. for life, remainder to the heirs of her body begotten by the said G. S., the marriage took effect; it was resolved by the whole court that, though the deed could not operate as a bargain and sale, because there was no money consideration, nor as a release because there was no lease for a year, nor as a deed of confirmation because the grantees were neither of them in possession, nor as a feoffment because there was no livery of seisin, and though it seemed to be the intent of the parties that the deed should operate as a common law conveyance, yet it should operate as a covenant to stand seised, whereby an estate in special tail was clearly in A. S.; and G. S. had only an estate for life by implication with a reversion in fee. 2 Wils. 22. *Doe v. Assignees of Simpson*. S. C. Willes's Rep. 673. So in the case of *Roe v. Tramarr*, Willes's Rep. 682. S. C. 2 Wils. 75. where T. K.

being seised in fee of certain premises, by lease and release in consideration of natural love to his brother C. K. and of 100*l.* granted, released and confirmed to the said C. K. the said premises after the death of him the said T. K. to hold to the said C. K. and the heirs of his body, and after their decease to J. W. eldest son of his the grantor's well-beloved uncle J. W. and his heirs and assigns, to the only proper use of the said J. W. the younger, his executors, administrators, or assigns for ever, the said J. W. the younger paying to the child or children of his the grantor's brother S. K. 200*l.*, and for want of such children to other nephews and nieces therein mentioned, and for want of such children the estate was to be free from the payment of the sum of 200*l.*: the release contained covenants from the grantor that he was seised in fee; and that it should be lawful for C. K. or J. W. the younger, after his the grantor's death, peaceably and quietly to hold, &c.; and it was thereby covenanted, granted and agreed by and between the said parties, that all fines, recoveries and other assurances of the said premises already levied, suffered and executed by and between the said parties should enure to and for the only use and behoof of C. K. and the heirs of his body, and for want of such issue to the use of J. W. the younger, his heirs and assigns for ever. At the

time of executing the deeds C. K. paid 20*l.* part of the consideration in money, and gave his note for the remainder; and a receipt was signed by T. K. for the whole sum. T. K. continued seised until his death. C. died without issue. It was unanimously resolved, that though the deed would not operate as a release, because it granted a freehold in future, which cannot by law be done, yet the deed of release operated as a covenant to stand seised, to the use of J. W.: [a] that all the particular rules, that have been laid down with respect to covenants to stand seised, concurred in that case; for there was 1. a deed. 2. words sufficient to make a covenant; there being not only the word *grant*, which has been often construed as a word of covenant, but the grantor likewise expressly covenanted in two places in the deed that the estate should go to J. W. in such manner as he had granted it. 3. The grantor was actually seised at the time of the grant. 4. The intent of the grantor was plain that J. W. should have the estate after the death of C. K. without issue, for it is so said in express words in three places in the deed: and lastly, there

was a proper consideration to raise the use; [b] for J. W. is called in the deed eldest son of his well-beloved uncle J. W.; and indeed if it were not so said in the deed, his relation to the grantor might be averred and proved according to the case of *Goodtitle v. Pitto*. 2 Str. 934, 935. and several cases there cited out of Lord Coke's reports. 8. P. 7 Bro. Parl. Cas. 70. *Filmer v. Gott*. 3 Term Rep. 474. *Rex v. Inhabitants of Scammonden*, and see the case of *Woolly v. Pickard*. 1 Saund. 236. c. note (9), and the court seemed to doubt the authority of *Hore v. Dix*, 1 Sid. 25. and *Samon v. Jones*, 2 Vent. 318. which are in truth overruled by this case. See further 1 Lutw. 789. *Sleigh v. Metham*. 1 Mod. 175, 176. *Scudamore v. Crossing*. S. C. 2 Lev. 9. *ibid*. 213. *Walker v. Hall*. Carth. 38, 39. *Harrison v. Austin*. 2 Vez. 252. *Rigden v. Vallier*. Cowp. 599, 600. *Goodtitle v. Bailey*. Upon these cases the observation of Levinz (3 Lev. 372.) appears to be very proper, "that the judges of late years have had a greater consideration for the passing of the estate, which is the substance of the deed, than the manner how, which is the shadow." (c)

[a] On the authority of *Roe v. Transmarr* it was held in 4 Taunt. 20 *Doe v. Whittingham* that a covenant to stand seised is good, though the use be a freehold to arise at a future time.

[b] The only considerations which will support a covenant to stand seised are blood and marriage; therefore if a person covenant to stand seised to the use of a relation and a stranger, it is said that the whole use will vest in the relation. 2 Roll. Abr. 784. Pl. 2. & 4. So where a man covenants to stand seised to the use of himself for life, with remainders over to his relations, and with a power for the tenant for life to make leases: this power is void,

for the lessees would be strangers to the consideration of blood. Cro. Jac. 181. *Cross v. Faustenditch*. So if a man should covenant to stand seised to the use of himself for life, with remainder to the use of trustees (who are not his relations) for the purpose of preserving contingent remainders, with remainder to his first and other sons in tail, &c. no use would vest in the trustees, because the consideration does not extend to them. This is a principal reason why covenants to stand seised are fallen into disuse. 2 Saunders, U. & T. 82.

[c] So a deed intended to operate as a bargain and sale, but which was void

(2) So in 1 Vent. 109. *Monnington v. William*, it was said by *Twysden J.* that where a man in pleading sets forth his title by conveyance, in which are the words give, grant, release, confirm, bargain, sell, &c. he must express to which of them he will use it. S. P. Co. Litt. 301. b. And in *Osmere v. Sheafe*. Carth. 308. where the court, being of opinion that the grant of a rent by deed under the circumstances operated as a covenant to stand seised, said, that the defendant had done well in pleading it as a conveyance by way of covenant to stand seised; for if he had pleaded it as a grant of the rent, it would have been void. So where in *replevin*, the defendant avowed for rent, and pleaded a grant of a rent-charge to another, and brought it down by several meane conveyances to the father of the defendant in fee, and the father being so seised, by indenture in consideration of natural love and affection to his son the defendant, and of 5*l.* paid by him, gave, granted, assigned and transferred the rent to the defendant in fee, "which said grant, there being no attornment or other execution had thereon, except only the sealing and delivery of the deed, operated by way of covenant to stand seised to the use of the defendant; whereby and by force of the statute of transferring uses into possession," the defendant was seised, and avowed for so much rent in arrear: upon which the plaintiff demurred; and it was resolved by the whole court, that pleading that "no attornment, or any other execution had thereon," and so pleading the special matter, and leaving the determination of the law to the court, was impertinent and idle. 2. It was resolved by *Powell, Rokesby* and *Ventris* justices, that pleading in the words of the deed, "that he gave, granted," &c. was sufficient, and the court would construe them according to their legal operation: but they agreed that the defendant might have pleaded this conveyance as a covenant to stand seised of the rent to him and his heirs, which they said, would have been the more neat pleading: *Pollexfen C. J.* however held the contrary, and that pleading in the words of the deed was altogether bad, and the defendant ought to have pleaded it at his peril according as he intended to use it, namely, that his father covenanted to stand seised to the defendant and his heirs;

as such for want of a pecuniary consideration has been held to operate as a confirmation. Cro. Jac. 127. *Osborn v. Churchman*. So a conveyance void as a lease and release, because the releasor had only a term of years, was held to operate as a grant and assignment of the term. Gilb. R. 143. *Marshall v. Franks*. See the observations of Lord *Ellenborough C. J.* in 6 East, 105. *Roe v. Archbishop of York*.

In practice, the following case occasionally occurs. An estate being settled upon A. for life, with remainder to the use of trustees and their heirs during his life, in trust to support contingent re-

mainders, with remainder to the first and every son of A. successively in tail, with remainders over: A. in order to enable his eldest son to suffer a common recovery, by deed, not operating as a feoffment, bargain and sale, or lease and release, surrenders to his son his estate for life. This deed cannot operate in strictness as a surrender, on account of the intervening estate of the trustees: but it is the prevailing opinion of the profession that it will operate as a covenant to stand seised; and the validity of many titles depend on this construction. 2 Sand. U. & T. 79.

and he resembled it to the case where the words "give, grant, release and "confirm," are in a deed, the party who pleads it must rely upon one of them only; and because it was not so done in this case, he was of opinion that judgment ought to be given for the defendant: upon which a writ of error was brought into the K. B. and the judgment was reversed for that cause only, in not pleading according to what *Pollexfen* had held. 3 Lev. 291. *Baker v. Lade*. S. C. 4 Mod. 149. Carth. 253. Skin. 315. 2 Vent. 149. 1 Lutw. 570. *Chaloner v. Davis*. See

Com. Dig. Pleader. (C. 37.) And if the deed be by the words "*dedi* and "*concessi*, &c." yet if it operates as a bargain and sale, it ought to be so pleaded. Cro. Eliz. 166. *Taylor v. Vale*. See also 1 Ld. Raym. 403, 404. *Chaloner v. Davis*.

(3) So if a jury by their verdict take upon themselves to collect the contents of a deed, and yet by the same verdict find the deed *in hæc verba*, the court will not regard the collection they have made of the substance of the deed, but the deed itself. Vaug. 77. *Rowe v. Huntingdon*. Cro. Eliz. 515.

Case 17.

Jaques *versus* Cesar.

Pasch. 22 Car. II. Regis. Rot. 752.

Writ of error.

OUR lord the king has sent to his trusty and well-beloved Sir *John Vaughan* knt. his chief justice of his bench, his writ close in these words, to wit: *Charles* the Second, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to our trusty and well-beloved sir *John Vaughan* knt. our chief-justice of our bench, greeting: Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our court before you and your companions, our justices of the bench, by our writ between *Augustin Cesar* doctor of physick, and *Robert Jaques* late of the city of *Canterbury*, in the county of the city of *Canterbury*, esq. late sheriff of the said county, of a plea of debt of 55*l.* 10*s.* which the said *Augustin* demanded of the said *Robert*, as it is said, manifest error has intervened, to the great damage of the said *Robert*, as by his complaint we are informed; We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that, if judgment be thereupon given, then you send to us distinctly and openly under your seal the record and proceedings, with all things concerning the same, and this writ, so that we may have them in fifteen days from the day of *St. Martin*, wheresoever we shall then be in *England*, that the record and proceedings aforesaid being inspected, we may

cause further to be done thereupon for correcting that error, what of right, and according to the law and custom of *England*, ought to be done. Witness ourself at *Westminster*, the 26th day of *October*, in the 21st year of our reign.

JAQUES v.
CESAR.

The answer of Sir *John Vaughan* knt. the chief-justice within named.

The record and proceedings of the plaint whereof mention is within made, with all things concerning the same, I send before our lord the king wheresoever, &c. at the day within contained, in a certain record to this writ annexed, as within I am commanded.

Answer.

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John Vaughan.

Pleas at *Westminster* before Sir *John Vaughan* knt. and his companions, justices of our lord the king of the bench, of the term of the Holy *Trinity*, in the 21st year of the reign of our lord *Charles* the Second, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. Roll. 752.

Kent, to wit. *Robert Jaques*, late of the city of *Canterbury*, in the county of the city of *Canterbury*, esq. sheriff of the county of *Kent*, was summoned to answer *Augustin Cesar*, doctor of physick, of a plea that he render to him 55*l.* 10*s.* which he owes to, and unjustly detains from him, &c. And whereupon the said *Augustin*, by *Philip Bartholomew* his attorney, says, that whereas he the said *Augustin* heretofore, to wit, in the term of St. *Michael*, in the 20th year of the reign of our lord the now king, before Sir *John Vaughan* knt. and his companions, then justices of our said lord the king of the bench here, to wit, at *Westminster*, by the consideration of the said court, recovered against *Joseph Travers* late of the city of *Rochester*, in the county aforesaid gent. 55*l.* 10*s.* which were adjudged to the said *Augustin*, in the said court here for his damages which he had on occasion of a certain trespass by the said *Joseph* with force and arms, and against the peace of our lord the king at the city of *Rochester* aforesaid, committed upon the said *Augustin*, whereof he is convicted, as by the record and proceedings thereof remaining in the said court of our said lord the king of the bench aforesaid here, to wit, at *Westminster* aforesaid, manifestly appears. And whereas the said *Augustin*, for the more speedy obtaining of the said 55*l.* 10*s.* so as aforesaid recovered, to wit, on the 23d day of *October* in the term of St. *Michael* aforesaid, in the 20th year of the reign of our said lord the now king aforesaid,

Debt against the sheriff for an escape of one in execution.

Plaintiff recovered judgment against one J. T. in the C. B. for 55*l.* 10*s.* (See 1 Saund. 98, 99. *Jones v. Pope*);

and sued out a ca. sa. thereon against the said J. T. to the sheriff of K.

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CESAR.

[99]

Sheriff makes
his mandate to
the bailiff of the
liberty of R.,

who gave no
answer.
Non omittas ca.
so. sued out.

sued and prosecuted, out of the said court of our said lord the king of the bench here, a certain writ of our said lord the king of *capias ad satisfaciendum*, of and upon the said judgment, against the said *Joseph*, directed to the then sheriff of *Kent* (where the original writ of the trespass aforesaid first issued), by which said writ our said lord the now king commanded the said then sheriff of *Kent*, that he should take the said *Joseph*, if, &c. and him safely, &c. so that he should have his body before the justices of our said lord the king here, to wit, at *Westminster* aforesaid, in 15 days from the day of *St. Martin* then next following to satisfy *Allan Lockhart esq. clerk of our lord the king assigned in the court of our said lord the king of the bench here, of 88s. and the said Augustin of 51l. 2s.* amounting in the whole to the said 55l. 10s. whereof the said *Joseph* was convicted, and that he should have there then that writ, &c. At which said day, to wit, in 15 days of *St. Martin*, came the said *Augustin* by the said P. B. then his attorney, and the said sheriff of *Kent*, to wit, *Sir John Williams* bart. then returned to the said then justices of our said lord the king of the bench here, that by virtue of the said writ to him directed, he made his mandate to the bailiff of the liberty of the mayor and aldermen of the city of *Rochester* aforesaid, to take and arrest the said *Joseph*, which said bailiff has the return of all writs and precepts, and the execution of the same within the said liberty, so that no execution of the said writ could be made by the said sheriff within the said liberty; which said bailiff had not given him any answer thereto.—Therefore at the instance of the said *Augustin*, by another writ of our said lord the king of *capias ad satisfaciendum* upon the said judgment, the then sheriff of *Kent* was then commanded, that he should not omit by reason of any liberty of the bailiff of the liberty of the mayor and aldermen of the city of *Rochester*, aforesaid, but that he should take the said *Joseph*, if, &c. and him safely, &c. so that he should have his body here on the morrow of the *Purification of the blessed Mary* then next following, to satisfy the said *Allan of the said 88s. and the said Augustin of the said 51l. 2s.* amounting in the whole to the said 55l. 10s., whereof the said *Joseph* was so as aforesaid convicted. At which day, to wit, on the said morrow of the *Purification of the blessed Mary* here came the said *Augustin* by his attorney aforesaid, and the sheriff had done nothing thereon, nor had he sent the writ thereof: therefore at the instance of the said *Augustin*, as before, the then sheriff

of *Kent* was then commanded, that he should not omit by reason of any liberty of the said bailiff of the liberty of the mayor and aldermen of the city of *Rochester* aforesaid, but should take the said *Joseph*, if, &c. and him safely, &c. so that he should have his body here in one month from the day of *Easter* then next following, to satisfy the said *Allan* of the said 88s. and the said *Augustin* of the said 51l. 2s. amounting in the whole to the said 55l. 10s., &c. whereof the said *Joseph* was so as aforesaid convicted, and that the said sheriff should have then there that writ. Which said writ so as aforesaid prosecuted the said *Augustin* afterwards, and before the return of the said writ, to wit, on the 24th day of *March*, in the 21st year of the reign of our said lord the now king, at the city of *Rochester* aforesaid, in the said county of *Kent*, was delivered to the said *Robert Jaques*, then being sheriff of the said county of *Kent*, to be executed in form of law: by virtue of which said writ, the said *Robert Jaques*, so being then sheriff of the said county of *Kent* as aforesaid, afterwards and before the return of the said writ, to wit, on the said 24th day of *March*, in the 21st year aforesaid, at the city of *Rochester* aforesaid, in the county of *Kent*, took and arrested the said *Joseph*, and then and there had him in his custody in execution for the damages aforesaid: And the said *Joseph* being so as aforesaid in the custody of the said *Robert Jaques*, then sheriff of the said county of *Kent*, in execution for the damages aforesaid, he the said *Robert Jaques* afterwards, to wit, on the said 24th day of *March*, in the 21st year aforesaid, then being sheriff of the said county of *Kent*, permitted the said *Joseph*, at the city of *Rochester* aforesaid, against the will of the said *Augustin*, to escape out of his custody, and go at large wheresoever he would, he the said *Augustin* not being satisfied or paid the damages aforesaid so as aforesaid recovered; whereby an action has accrued to the said *Augustin* to demand and have, of and from the said *Robert Jaques*, the said 55l. 10s., yet the said *Robert* (although often required) has not yet paid to the said *Augustin* the said 55l. 10s. but to pay the same to him has hitherto altogether refused, and still refuses; wherefore he says, he is injured, and has sustained damage to the value of 20l. and therefore he brings suit, &c.

And the said *Robert Jaques* by *John Dawling* his attorney, comes and defends the wrong and injury, when, &c. and the said attorney says, that he is not informed by the said *Robert* his master, to give any answer for the said *Robert* to the said

JACQUES v.
CESAR.

Writ delivered
to the defend-
ant then sheriff
of K.

[100]

who by virtue
thereof arrested
the said J. T.

and afterwards
permitted him
to escape.

whereby an ac-
tion has accrued
to the plaintiff,
&c.

Judgment by
non sum infor-
matus.

JAQUES v.
CESAR.
Judgment.

Augustin in the said *plaint*, and he says nothing else thereto; wherefore the said *Augustin* remains against the said *Robert*, undefended therein. Therefore it is considered, that the said *Augustin* recover against the said *Robert* his debt aforesaid, and his damages on occasion of the detention of the said debt to 60s. adjudged by the court here to the said *Augustin*, with his assent, and the said *Robert* in mercy, &c.

Case 17.

Jacques *versus* Cesar.

Paschæ 22 Car. II. Regis. Rot. 752.

S. C. 2 Keb. 646.

The plaintiff had judgment for 55l. 10s. and the ca. sa., upon which the defendant was taken in execution, was only for 51l. 2s. and the plaintiff in debt for an escape recovered against the sheriff 55l. 10s. — This mistake in the execution is not assignable for error by the sheriff

* [101]

ERROR (1) by *Jaques* against *Cesar* to reverse a judgment in the common pleas in an action of debt for an escape, in which the plaintiff declared, that he had recovered in the common pleas against one *Joseph Travers* 55l. 10s. for damages in an action of trespass and that he had sued out a writ of *capias ad satisfaciendum* against *Travers*, directed to the sheriff of *Kent*, by which the sheriff was commanded to take *Travers* to satisfy * *Allan Lockhart*, esq. clerk of our lord the king assigned in the court of our lord the king of the bench here 88s., and *Augustin Cesar*, who was the plaintiff in the common pleas, 51l. 2s. amounting in the whole to 55l. 10s. whereof he was convicted, &c. and that by force of that writ, the defendant being sheriff of *Kent* took *Travers* in execution, and afterwards let him go at large, the debt not being satisfied, whereby an action accrued to the plaintiff to demand and have the 55l. 10s. of the defendant, yet, &c.

(1) A writ of error is an original writ issuing out of the court of chancery, in the nature, as well of a *certiorari* to remove a record from an inferior into a superior court, as of a commission to the judges of such superior court to examine the record, and to affirm, or reverse it, according to law; and lies, where a party is aggrieved by any error in the foundation, proceeding, judgment or execution, of a suit in a court of record. Co. Litt. 288. b. 2 Bac. Abr. 187. 2 Inst. 40. Upon the ground of its being in the nature of a *certiorari*, it is holden, that

though the writ is irregularly sued out, and would therefore be quashed in the superior court, yet the record is removed by it, if rightly described, and remains in the superior court after the writ is quashed. 1 Str. 606. *Cowper v. Ginger*. S. C. 2 Ld. Raym. 1403. 8 Mod. 316. 2 Term Rep. 737. *La-roche v. Wasbrough*. Arg. Cas. temp. Hardw. 135. *Radcliff v. Burton*. 1 Str. 233. *Brewer v. Turner*. 8 Mod. 305. *Cooper v. Ginger*. And upon the principle of its being in the nature of a *commission*, it is, that a writ of error was not amendable at common law, be-

The defendant in the common pleas suffered judgment to pass by *nihil dicit*, and thereupon the plaintiff had judgment to recover 55*l.* 10*s.* and costs of suit, upon which the defendant brought a writ of error in this court. And now *Saunders*

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cause no court was ever allowed to amend its own commission. 1 Str. 607. *Cowper v. Ginger*. See post, 101. *a.* and note. But in a writ of error *coram nobis* hereafter noticed, the *certiorari* part being unnecessary, is omitted, and the writ contains only a commission to examine errors. The form of a writ of error from the common pleas to the king's bench, is that in the beginning of this entry; and the form of a writ of error *coram nobis* may be seen in Tidd's Prac. Forms, 468.

A writ of error is grantable in all cases *ex debito justitiæ*, except in treason and felony; so resolved by ten of the judges. 2 Salk. 504. *Reg. v. Paty*. And a distinction is taken by Lord Holt, that wherever a new jurisdiction is created by act of parliament, and the court or judge that exercises this jurisdiction, acts as a court or judge of record, according to the course of the common law, a writ of error lies on their judgments; but where they act in a summary method, or in a new course different from the common law, a writ of error does not lie, but a *certiorari*. 1 Salk. 263. *Groenvelt v. Burwell*. S. C. Carth. 494. Com. Rep. 80. S. P. 1 Salk. 144. If an erroneous judgment be given in a court, which is not a court of record, no writ of error lies, but a writ of false judgment. F. N. B. 38. A. 7 edit. Co. Litt. 288. b.

A writ of error lies for some error or defect in substance, which is not aided at common law, or by some of the sta-

tutes of jeofails; and may be brought in the same court where the judgment was given, or to which the record is removed by writ of error, or in another court. Error may be brought in the same court where the judgment was given, when the error is not assigned for any fault in the court, but for some defect in the execution of the process; or through the default of the clerks. 1 Roll. Abr. 746. F. N. B. 49. T. 7th edit. Indeed it is said that the court of common pleas may in the same term reverse their own judgment for error in process, or default of the clerks, without any writ of error; but in another term, the party must sue out a writ of error to the king's bench. F. N. B. 49. I. 7th edit. So a writ of error may be brought in the same court for an error in fact; thus, where an erroneous judgment is given, in matter of fact only, and not in point of law, in the king's bench, it may be reversed in the same court by writ of error, which is sometimes called error *coram vobis*, but more correctly, *coram nobis* [a] or *quæ coram nobis resident*; because the record and process, on which it is founded, are stated in the writ to remain in the court of our lord the king before the king himself: as where the defendant, being under age, appeared by attorney; or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict, or interlocutory judgment. 1 Roll. Abr. 747. pl. 13. Cro. Eliz. 106. *Meggot v.*

[a] In the common pleas the writ is properly called a writ of error *coram vobis* or *quæ coram vobis resident*. Tidd's

Pract. 117. b. for there the record and process are stated to remain before the king's justices of the bench.

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assigned for error at the bar, that the plaintiff in the common pleas had demanded, and had judgment to recover more than, by his own shewing, was due to him; for though he had judgment in the first action to recover 55*l.* 10*s.*, yet the writ

Broughton. 1 Sid. 208. *Rez v. Cornwall.* But if the error be in the judgment itself, and not in the process, a writ of error does not lie in the same court, but must be brought in another. 1 Roll. Abr. 746. pl. 1. 2 Bac. Abr. 215. So if a record be removed into the king's bench by a writ of error, and the writ afterwards abate, either by judgment of the court, or by plea, death, or otherwise; 1 Roll. Abr. 753. (Q.) pl. 1. Yelv. 6. *Crumwell v. Andrews.* Cro. Eliz. 891. *Andrews v. Cromwell.* Latch. 198. *Dun v. Dean and Chapter of Carlisle*; or if it be quashed for any other fault than variance, Carth. 367. *Walker v. Stokoe.* S. C. 1 Ld. Raym. 151. 1 Str. 606. *Cooper v. Ginger.* S. C. 2 Ld. Raym. 1403. 8 Mod. 316.; error *coram nobis* lies in that court; for if there had been a variance between the record and the writ of error, the record was not removed, but there must have been a new writ; and therefore error *coram nobis* did not lie. Indeed it is not necessary now to have a new writ of error, because by the statute 5 Geo. 1. c. 13. it is enacted, "that all writs of error wherein there shall be any variance from the original record, or other default, shall be amended and made agreeable to such record, by the respective courts where such writs of error shall be made return-

"able." [b] But error *coram nobis* does not lie in the king's bench after an affirmance in that court. 2 Str. 949. *Horn v. Bushel.* Ibid. 975. *Burleigh v. Harris*, in which last case, 1 Salk. 337. *Winchurch v. Belwood*, to the contrary is denied; nor does it lie in the king's bench after an affirmance in the exchequer chamber. 1 Str. 690. *Lambell v. Pretty-John.* And if a writ of error, brought into the exchequer chamber upon a judgment in the king's bench, abate by death or otherwise, no writ *coram nobis* lies there, for the record itself is not removed there by the writ of error, but only a transcript; and therefore there must be a new writ of error. 1 Roll. Abr. 755. pl. 16. Cro. Jac. 620. *Cave v. Polewheel.* So a writ of error does not lie for error in fact, either in the exchequer chamber or house of lords. 2 Lev. 38. *Hopkins v. Weigglesworth.* S. C. 1 Vent. 207. Com. Rep. 597. *Roe v. More.*

Next with respect to a writ of error to another court. A writ of error lies from the common pleas, and also from all inferior courts of record in England, except in London, and some other places, to the king's bench, for the error or mistake of the judges in point of law; 4 Inst. 21, 22. Finch. Law. 480. 2 Burr. 777. *Ballard v. Bennet*; and after judgment is given thereon in the king's bench, another writ of error may be

[b] So where defendant in an action of covenant sued out a writ of error from C. B. into K. B. in a plea of *trespass on the case*, it was held no supersedeas, though the defendant in error had been served with the allowance of

the writ, and had given a rule to transcribe; 5 Taunt. 82. *Sampayo v. De Payba*; but the court of K. B. permitted the writ to be amended. Ibid. 86.

of *capias ad satisfaciendum* was to satisfy the plaintiff only 51l. 2s. and to satisfy *Lockart* the prothonotary, the residue being 88s.: and the prothonotary may recover it for the escape, but the plaintiff ought not, because *Travers* never

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brought upon that judgment in the house of lords: but a writ of error does not lie in the *common pleas* upon an erroneous judgment given in an inferior court of record. Cro. Eliz. 26. *Roe v. Hartly*. Finch Law. 480. Dy. 230. A writ of error lies from the proceedings on the law side of the exchequer into the court of exchequer-chamber before the lord chancellor, and lord treasurer, calling to their assistance the judges of the courts of king's bench, and common pleas, or some of them: and from thence it lies to the house of lords. 2 Bac. Abr. 213. stat. 31 Edw. 3. c. 12. 4 Inst. 105. But the chancellor and treasurer, or the chancellor only, if there be no treasurer, are the judges there, and judgment shall be entered pursuant to their sentence, though the other justices differ in opinion. 8 H. 7. 13. a. Carth. 388. *King v. Hornely*, or the *Banker's case*. S. C. 5 Mod. 42—62. Upon a judgment given in the hustings in *London*, a writ of error lies at *St. Martin's* before certain commissioners appointed under the great seal, and from thence immediately into the house of lords. 1 Roll. Abr. 745. pl. 19. post, 253. 2 Bac. Abr. 215. If an erroneous judgment be given in the cinque-ports, a writ of error does not lie into the king's bench, but it shall be redressed before the constable of *Dover* at the court at *Shepway*, 4 Inst. 224. Upon a judgment given in the court of *Stannaries* in the duchy of *Cornwall*, for any matters touching the *Stannaries*, no writ of error lies to the king's bench, but the course is to appeal to the warden of the *Stannaries*, and from him to the prince, and when there is no prince, to

the king's council. 1 Roll. Abr. 745. pl. 8. 3 Bulst. 183. *Langworthy v. Scott*. A writ of error lies in the king's bench upon a judgment in a county-palatine, because it was derived from the crown. 1 Roll. Abr. 745. pl. 7. Dy. 321. a. 21 H. 7. 33. b. And by the statutes 34 & 35 H. 8. c. 26. s. 113. and 1 W. & M. c. 27. s. 4., errors in judgment in pleas real, mixed, and personal, before the justices in their great sessions in *Wales*, shall be redressed by writ of error in the king's bench.

Formerly no writ of error lay on a judgment in the king's bench in any other court except in parliament; but now by statute 27 Eliz. c. 8. it is enacted, "that where any judgment shall be given in the king's bench, in an action of debt, detinue, covenant, account, action upon the case, ejectment, or trespass, first commenced there, other than such only where the queen shall be party, the plaintiff or defendant against whom such judgment shall be given, may at his election sue out of the court of chancery a special writ of error, directed to the chief justice of the king's bench, commanding him to cause the record, and all things concerning the judgment, to be brought before the justices of the common-bench, and barons of the exchequer, into the exchequer-chamber, there to be examined by the said justices and barons; which said justices, and such barons as are of the degree of the coif, or six of them at the least, shall have full power and authority to examine all such errors as shall be assigned in or upon any such judgment."

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was in execution at the suit of the plaintiff for more than 51l. 2s., and yet he demanded 55l. 10s. in his action for the escape, and so he declared for more than he ought. And that here the sheriff does not take advantage of any error in

ment, and thereupon to reverse or affirm the same, as the law shall require, *other than for errors concerning the jurisdiction of the court of king's bench, or for want of form in any writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding whatsoever; and after the said judgment shall be affirmed or reversed, the said record, and all things concerning the same, shall be brought back into the king's bench, that further proceedings may be had thereupon, as well for execution as otherwise; but such reversal or affirmation shall not be so final, but that the party grieved shall and may sue in the high court of parliament, for the further and due execution of the said judgment, as was then usual upon erroneous judgments in the court of king's bench.* In the construction of this statute it is holden, that a writ of error does not lie in the exchequer-chamber upon a judgment in the king's bench, in an action commenced there by *original writ*, but only where the action is *by bill*; 1 Sid. 424. *Redman v. Edolph.* Doug. 352. *Lloyd v. Skutt*, note (3). 1 Saund. 346. *Mellor v. Spateman*, and note (4); and that the statute is confined to the seven particular actions enumerated therein, ante, 71 a. note: and does not extend to an action of replevin; 2 Roll. Rep. 140. 434.; or of *scandalum magnatum*, for it is not a mere action upon the case, but is founded on the statute 2 Ric. 2. c. 5., and is for the king and party; Cro. Car. 142. *Lord Say and Seale v. Stephens*, S. C. Sir. W. Jones, 194, 195. Ley, 82. 1 Sid. 143. *Lord Stamford v. Nedham*. 1 Vent. 49. 2 Ld. Raym. 954. *Ashby v.*

White: or of rescous, though it is in the nature of a trespass; Cro. Jac. 171. *Vaughan v. Williams*. Moor, 694. *Ody v. Yate*: or of ravishment of ward; 2 Roll. Rep. 134. *Barnefield v. Hutchins*; or to a judgment in *scire facias* upon a recognisance of bail; Cro. Jac. 171. *Vaughan v. Williams*. Yelv. 157. *Prowse v. Turner*. Sir W. Jones, 325. *Lancaster v. Keylei*. 1 Ld. Raym. 98. *Hartop v. Holt*. In these actions therefore a writ of error will not lie in the exchequer-chamber, but must be brought in parliament. If a *scire facias* be brought to revive a judgment against the party, or his executors, a writ of error will lie in the exchequer chamber, *tam in redditione judicii, quam in adjudicatione executionis*, because it is only in execution of the first judgment, the merits of which still remain to be examined. 1 Ld. Raym. 98. *Hartop v. Holt*. S. C. 1 Salk. 263. 1 Vent. 168, 169. *Skinner v. Webb*. Cro. Car. 464. *Anon.* but not upon an award of execution only. 1 Ld. Raym. 98. 2 Str. 1102. *Bertie v. Clutterbuck*. Andr. 287. *Crow v. Maddock*: even though the judgment has been affirmed in the exchequer-chamber, and execution is afterwards awarded in the king's bench. 1 Ld. Raym. 97. *Hartop v. Holt*. S. C. 1 Salk. 263. 5 Mod. 228. If a judgment be affirmed in the king's bench on error, a writ of error lies from thence to the house of lords, and not to the exchequer-chamber. 1 Roll. Rep. 264. *Harvey v. Williams*. 2 Buls. 162. See the form of a writ of error into the exchequer-chamber. Clift. 332. Tidd's Pract. Forms, 471. It was for some time a question whether a writ of error lay in the exchequer-chamber, upon a judgment in an action of debt

the *capias ad satisfaciendum*, but the writ itself, was only for 51l. 2s. for the plaintiff, and therefore he cannot sue for more upon the escape. And if a judgment be given for 100l., and the party sue out a *capias ad satisfaciendum* only for 50l. parcel

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qui tam upon the statute of usury, or other penal actions, where the king is a party; 1 Sid. 240. *Whitton v. Preston*. 1 Vent. 49. *Parris's case*. 5 Mod. 230. *Hartop v. Holt*. Ley 82. Sir T. Raym. 275. *Scot v. Knapton*; but it now is holden, that a writ of error does lie there in such actions. Doug. 353. *Lloyd v. Skutt*, note (91).

Regularly no writ of error doth lie, unless there be a judgment or an award in nature of a judgment; for the words of the writ are, "*si judicium redditum sit, &c.*" Co. Litt. 288. b. Therefore it was formerly holden, that a writ of error could not be brought *before* judgment was given; and if it bore teste *before*, it was no *supersedeas*. 1 Roll. Abr. 749. (M.) pl. 1. Moor, 461. pl. 647. 2 Bac. Abr. 199. But it seems now agreed, that a writ of error which bears teste *before* the judgment, is good, provided the judgment is given *before* the return of the writ; and this is the usual course for preventing and superseding executions; and as the judgment relates to the first day of the term, a writ of error returnable after that day will remove the record, whenever the judgment is entered. 1 Vent. 96. *Prydyerd v. Thomas*, 255. *Baker v. Bulstrode*. 1 Mod. 112. *Ayres v. Lenthall*. 2 Sid. 104. *Williams v. Jenkins*. 1 Str. 632. *Morfoot v. Chivers*. 1 Term Rep. 279. *Jaques v. Nixon*. Still, however, a writ of error will not remove a judgment given after the term, in which the writ of error is returnable, but a writ of error so returnable before the judgment may be quashed, unless the plaintiff has delayed signing judgment until after the return of the writ, on purpose to defeat it. 2 Ld. Raym.

1179. *Wilson v. Ingoldsby*. Ibid. 1531. *Canning v. Wright*. S. C. 2 Str. 807. 834. *Rejindoz v. Randolph*. 891. *Vice v. Burton*.

By statute 10 & 11 W. 3. c. 14. it is enacted, "that no judgment in any real or personal action, shall be reversed or avoided, for any error or defect therein, unless the writ of error be brought, and prosecuted with effect within twenty years after such judgment signed, or entered of record." The statute has the usual exceptions in favour of infants, femes-covert, persons *non compos mentis*, in prison or beyond the seas. But the court will not on motion quash a writ of error, though brought twenty-nine years after the judgment, for it would deprive the party of the benefit of replying the exceptions in the statute. 2 Str. 837. *Higgs v. Evans*.

This writ is usually brought by the party or parties against whom the judgment was given; and it may be brought by the plaintiff to reverse his own judgment, if erroneous, or given for a less sum than he has a right to demand, in order to enable him to bring another action. 3 Bur. 1772. *Johnson v. Jebb*. If an action be brought against A. as a feme-sole, who is in truth a feme-covert, and she plead to issue as a feme-sole, and afterwards judgment be given against her, and she be taken in execution, she and her husband together may bring a writ of error, because otherwise the husband may be deprived of the society of his wife, and of her care in his domestic concerns, and in truth he has no other means to help himself. 1 Roll. Abr. 748. pl. 18. *Hayward v. Williams*. S. C. Sty. 254. 280. So if

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of the 100*l.*, and the sheriff take the prisoner, and suffer him to escape, now the party who sued out the execution shall recover upon the escape only the 50*l.* for which the prisoner was taken in execution, and not the whole 100*l.* contained

an action be brought against a feme-covert and others, they may all join with the husband in a writ of error. 1 Roll. Abr. 748. pl. 19.

We have already observed, that no person can bring a writ of error, unless he is party or privy to the record, or is prejudiced by the judgment, and therefore receives advantage by the reversal of it; ante, 46. note (6). It seems to be a settled rule, that the writ must be brought in the names of *all* the parties against whom the judgment is given, that it may agree with the record; and notwithstanding the death of any of the parties, he must still be named, and his death alleged in the writ, though the writ may be brought by the survivors alone, thus, "Because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our court before you and your companions, or justices of the bench, by our court, between A. B. (for whom judgment was given) and C. D. late of, &c. and E. F. (against whom judgment was given,) which said C. D. is since deceased, &c. to the great damage of the said E. F. who has survived the said C. D. &c." Palm. 152. *Bethill v. Parry*. 6 Rep. 25. *Ruddock's case*. S. C. Cro. Eliz. 648, 649. Yelv. 4. *Crumwell v. Andrews*. S. C. Cro. Eliz. 892. Carth. 7, 8. *Hacket v. Herne*. S. C. 3 Mod. 134. 1 Ld. Raym. 71. *Walker v. Stokoe*, S. C. 5 Mod. 1669. Carth. 367. Comb. 354. 1 Ld. Raym. 328. *Burr v. Attwood*. 2 Ld. Raym. 870. *Rous v. Etherington*. S. C. 1 Salk. 312, 313. 1 Str. 233, 234. *Brewer v. Turner*. 2 Ld. Raym. 1403. *Ginger v. Cowper*. S. C. 1 Str. 606. 8 Mod. 305. 316. 2 Ld. Raym. 1532. *Elkins v. Payne*. Cases temp. Hardw. 135. *Ratcliff v.*

Burton. 1 Wils. 88. *Vavasor v. Faux*. 3 Burr. 1792. *Knox v. Costello*; for where there is judgment against several, if one alone should be permitted to bring a writ of error, every defendant might bring a writ of error, and delay the plaintiff from his execution for a long time. Carth. 8. *Hacket v. Herne*. 3 Burr. 1792, and the writ so brought by one or more of the defendants only may be quashed. Carth. 8. 1 Ld. Raym. 71. *Walker v. Stokoe*. But if, in trespass against two or more, one pleads to issue, and there is a verdict and judgment for him, and a judgment by default, and afterwards final judgment against the others, or they all plead to issue, and one is found not guilty, and there is a verdict and judgment against the others, they may bring a writ of error, without the defendant who was acquitted, for he cannot say that it was to his damage; 1 Lev. 210. *Cannon v. Abbot*. S. P. Hob. 70. *Parker v. Lawrence*. 2 Str. 892. Ibid. 1110. *Rex v. Inhabitants of All Saints*. Cowp. 425. *Verelst v. Rafad*: but the suit must be described in the writ according to the record. 1 Str. 682. *Lady Cass v. Title*. Where one only of several defendants brings a writ of error, he must do it in the names of all, and if any one or more of them refuse to appear and assign errors, they must be summoned and severed, and then the writ of error may be proceeded in by the rest only; Yelv. 4. *Crumwell v. Andrews*. S. C. Cro. Eliz. 892. Carth. 7, 8. *Hacket v. Herne*. 6 Mod. 40. *Shepherd v. Orchard*. 1 Str. 234. *Brewer v. Turner*: and the court will give them time to assign errors, till there can be a summons and severance of the others. 2 Str. 783. *Frescobaldi v. Kinaston*;

in the judgment. And so it is here; wherefore he concluded that the judgment was erroneous.

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Sed non allocatur; for as it seems, the court over-ruled the exception, and said that the sheriff cannot take advantage of an error in process (2); and thereupon the judgment was affirmed by the court, who would not hear any more of the matter.

In debt against a sheriff for an escape, he cannot take advantage of error in the process of execution. See.

1 Saund. 38, 39. Jones v. Pope.

see the form of the writ of summons, Thes. Brev. 301.

But with respect to *defendants* in error, it has been holden, that where one only of two defendants in error appeared, and sued out a *scire facias quare executionem non*, and the plaintiff in error thereupon assigned errors, it was a waiver of the objection that the other should have joined, and the court was not to presume that he was alive. 3 Burr. 1789. *Knox v. Costello*.

A writ of error is considered as a new action; and therefore the defendant in the original action may change his attorney, without obtaining a judge's order for that purpose. 7 Term Rep. 337. *Batchelor v. Ellis*. It runs in the king's name; and, except in a county-palatine, must be directed to the chief justice, or other officer who has the custody of the record; as in the common pleas, "to our trusty, or right trusty, and well-beloved *John Lord Eldon*, our chief-justice of the bench." Lill. Ent. 222. 268. 281. 1 Rich. Prac. C. P. 426. 5th edit. Tidd's Pract. Forms. 470: in the king's bench, "to our trusty, or right trusty, and well-beloved *Lloyd Lord Kenyon* our chief justice assigned to hold pleas before us, or, in our court before us." Lill. Ent. 213. 254. 258. Tidd's Prac. Forms, 471., or if it be a writ of error *coram nobis*, "to our justices assigned to hold pleas before us." Lill. Ent. 220. 231. 232. Tidd's Pract. Forms, 468., and the writ of error in parliament is directed to the chief-justice of the king's bench upon

a judgment of that court. Lill. Ent. 254. See the form of a writ of error from the king's bench to the house of lords on a judgment originally given there; Tidd's Pract. Forms, 474., and on a judgment affirmed there. Ibid. or in the exchequer-chamber. Lill. Ent. 254. Tidd's Pract. Forms, 474.; and from the law side of the court of exchequer the writ of error is directed to the treasurer of the exchequer, and barons, for the record is in their custody. 4 Inst. 105. In the county palatine of *Lancaster* the writ of error is directed to the chancellor of the county-palatine or his deputy, commanding him that he make his mandate to the justices of *Lancaster*, that they send to him in his chancery, the record, &c. and the writ which came to them thereupon, and that he transmit the record, ante, 84. Clift. 335. To reverse a fine levied in the common pleas, the writ of error is directed to the chirographer, for the transcript, or the *note* of the fine, and *writs* of covenant; Lill. Ent. 280. or to the *custos brevium*, for the transcript of the *foot* of the fine. Ibid. 282. And in inferior courts the writ of error should be directed to the judges before whom the judgment was given. See ante, 28. 42. Where the writ of error is supposed to be *as well* in giving the judgment, as in awarding execution upon it, the writ of error is said to be *tam quam*, or in the words of the writ, *tam in redditione judicii quam in adjudicatione executionis*. 2 Str. 1055. *Street v. Hopkinson*. S. C. Cas. temp. Hardw. 345.

The writ of error is delivered to the clerk of the errors of the court in which the judgment is given, who will thereupon allow the same, and give a certificate or note of the allowance; see the form of the allowance, Tidd's Pract. Forms, 476. A writ of error, sued out and allowed *before* final judgment, continues in force during the whole term in which it is returnable; and if final judgment be signed at any time during that term, or in the subsequent vacation, it is a super-seedeas or stay of execution *from the time of signing the judgment*. Barnes, 196. *Warwick v. Figg*. 197. *Cook v. Horrock*. 198. *White v. Morgan*. 1 Str. 632. *Morfoot v. Chivers*; [c] provided bail, when requisite, be put in thereon, within four clear days *after judgment is signed*. 2 Str. 781. *Hunter v. Sampson*. 1 Term Rep. 279. *Jaques v. Nixon*, and *Doe v. Bracebridge* there cited. 4 Term Rep. 121. *Bennet v. Nicholls*. [d] And the court of king's bench has gone so far in support of the practice of suing out a writ of error before final judgment, that if the writ be sued out and allowed, and the plaintiff will not sign final judgment till a subsequent term after the return of the writ, in order to avoid the effect of it, and then sue out execution, the court will set it aside. 1 Term Rep. 280. *Jaques v. Nixon*. Barnes, 260.

Curd v. Eastmead. But a writ of error sued out *after* final judgment, and before execution executed, is a super-seedeas of execution, *from the time of its allowance*, and not from the time of service of the allowance. 1 Salk. 321. *Perkins v. Woolaston*. S. C. 6 Mod. 130. 1 Vent. 30. *Cotton v. Daintry*. 1 Burr. 340. *Capron v. Archer*. Willes's Rep. 271. *Meriton v. Stephens*. S. C. Barnes, 205. 1 Bos. & Pull. 478. *Gravall v. Stimpson*; provided bail when requisite, be put in and perfected within four days *after the allowance*: the distinction being that if a writ of error be allowed *before* judgment, the time of putting in bail runs from the signing of the judgment, but where it is allowed *after* judgment, the time of putting in bail runs from the time of the allowance, that is, after the delivery of the writ to the clerk of the errors. 2 Str. 781. *Hunter v. Sampson*. 1 Term Rep. 279. *Jaques v. Nixon*. 1 Bos. & Pull. 478, 479. *Gravall v. Stimpson*; the service of the allowance is only material to bring the attorney into contempt for proceeding to sue out execution afterwards. 2 Roll. Abr. 492. pl. 7. 1 Burr. 340. *Capron v. Archer*. 1 Term Rep. 280. *Jaques v. Nixon*. Willes's Rep. 275. *Meriton v. Stephens*. Barnes, 376. *Hannot v. Farettes*. [e] If after the allowance of a writ of error, and before the expira-

[c] 5 East, 145. *Somerville v. White*. S. P. And in 2 M. & S. 334. *Emanuel v. Martin*, it was held by Le Blanc J. (the only judge in court), that a writ of error may operate as a stay of proceedings, though sued out before *interlocutory* judgment.

[d] It was decided in 5 Taunt. 672. *Blackburn v. Kymer*, by the court of C. B. (after a communication with the judges of K. B.) that the four days in this case are to be reckoned from the time when final judgment is completed

by inserting the amount of the costs, and not from what is ordinarily called the signing of judgment.

[e] The allowance is notice of itself. 2 Bos. & Pull. 370. *Meagher v. Vandych*. 5 Taunt. 204. *Hawkins v. Jones*. 1 Chit. Rep. 238. *Braithwaite v. Brown*. 3 B. Moore, 83. *Cleghorne v. Des Anges*. 1 Gow. 66. S. C. Tidd's Pract. 1187. Where the defendant however had wilfully concealed the issuing the writ of error from the plaintiff, the court of K. B. set aside an execution afterwards

tion of the four days for putting in bail, the plaintiff will take out execution, he does it at his peril; for if bail be put in, in due time, the execution will be set aside; but if no bail be put in, it will be good, and the writ of error become a mere nullity. 2 Term Rep. 44. *Lane v. Bacchus*. [g] And it has been holden, that a writ of error is so absolutely a supersedeas, that after it is allowed, the plaintiff cannot take out a *capias ad satisfaciendum*, and have it returned *non est inventus* in order to proceed against the bail; 2 Str. 867. *Sweetapple v. Goodfellow*; and if he do so, the whole may be set aside upon motion. 2 Black. Rep. 1183. *Dudley v. Stokes*. And where the plaintiff sued out a *capias ad satisfaciendum* before the allowance of a writ of error, which was afterwards allowed, and notice thereof given before the *capias ad satisfaciendum* was returnable, he cannot call for a return of *non est inventus*. 2 Str. 1186. *Smith v. Nicholson*. S. C. 1 Wils. 16. though the *capias ad satisfaciendum* has lain in the office four days before the

allowance of the writ of error. 3 Term Rep. 390. *Perry v. Campbell*. And if the sheriff should return *non est inventus*, and the plaintiff sue out a *scire facias* against the bail upon their recognizance, they may plead that after the issuing of the *capias ad satisfaciendum*, and before it was returnable, a writ of error was issued and duly allowed, although it be not returned. 2 East. 439, *Sampson v. Brown*. And if bail in error, when required, are not put in, the plaintiff must shew that in his replication. Ibid. 445. If the defendant sue out a writ of error which is allowed, and the plaintiff bring an action on the judgment, and recover, he will not be permitted to sue out execution on the second judgment, till the writ of error be determined; for that would be allowing the plaintiff to have the fruit of his first judgment indirectly, which he cannot have directly by suing out execution upon it. 3 Term Rep. 643. *Benwell v. Black*. S. P. 4 Burr. 2454. *Taswell v. Stone*. [h] But where a writ of error is brought against good faith, 2 Term Rep. 183. *Cates v. West*;

issued without costs, and made the defendant undertake that no action should be brought. 1 Ghit. Rep. 238.

And where the defendant had applied to a judge in vacation to set aside the plaintiff's execution for irregularity, on a ground which the judge overruled, and afterwards applied to the court to set aside the execution, on the ground that he had before brought a writ of error; the court held that this fact not having been communicated to the judge on the former application, the defendant was now too late to take advantage of the irregularity. 2 B. & A. 373. *Thorpe v. Beer*. Tidd's Pract. 1187.

[g] If the bail put in be sham bail, the plaintiff may treat them as a nullity; and issue execution. 1 Barn. & Cress. 268. *Ward v. Levi*. 2 Dow. &

Ryl. 421. S.C. Ibid. *in notis. Crum v. Küchen*.

[h] But in C. B. the plaintiff may take out execution on the second judgment notwithstanding the writ of error, unless the defendant move to stay the proceedings. Tidd's Pract. 1188. And in K. B. where (several years having elapsed after judgment obtained) the plaintiff brought an action upon the judgment; and after judgment had been signed in this latter action, the defendant sued out a writ of error upon the first judgment; it was held that the plaintiff might notwithstanding take out execution upon the second judgment. In case the writ of error had succeeded, the defendant would have been entitled to have the money levied under such execution returned. 3 B. & A. 275. *Bishop v. Best*.

or where it manifestly appears either from the confession of the parties themselves, or from the admission of the attorney of the party who sues out the writ of error, or from expressions equivalent to an admission, that it is brought for the mere purpose of delay, 2 H. Black. 30. *Mitchell v. Wheeler*, and *Goodin v. Hammond* there cited, note (a). 3 Term Rep. 79. *Pool v. Charnock*. 4 Term Rep. 436. *Kempland v. Macauley*. 5 Term Rep. 669. *Levett v. Perry*. 714. *Masterman v. Grant*, it is holden to be no supersedeas. [i]

An execution, being an intire thing, cannot be superseded after it is once begun; therefore where a writ of *fiery facias* was sued out, and the sheriff levied on the defendant's goods under it, and afterwards, but before the sale, a writ of error was allowed, it was adjudged that the sheriff must notwithstanding sell the goods levied under the execution, but not proceed any further, and return the money into court to abide the event of the writ of error. Willes's Rep. 271. *Meriton v. Stevens*. Cro. Eliz. 597. *Charter v. Peeter*. Moor, 542, Yelv. 6. *Tocock v. Honyman*. 1 Vent. 255. *Baker v. Bulstrode*. So long as the writ of execution is executable, but not executed, the allowance of a writ of error is a supersedeas, but not afterwards. 1 Salk. 321. *Perkins v. Woolaston* [k]; in which last case it is said, that the utmost length of time which the law allows to execute

a writ, is the day on which it is returnable; and that it cannot be executed on that day *after the rising of the court*: but it has been since holden that it may be served *at any time* of the last day without any regard to the time of the rising of the court. 2 Burr. 812. *Maud v. Barnard*.

As to bail in error, it is to be observed that no bail was required at common law, but is now in many cases by particular statutes. By statute 3 Jac. 1. c. 8. (made perpetual by statute 3 Car. 1. c. 4. s. 4.) it is enacted, "that no execution shall be stayed or delayed, upon or by any writ of error (2 East, 439.) or supersedeas thereupon to be sued, for the reversing of any judgment in any action or bill of debt upon any *single bond* for debt, or upon any obligation with condition for the *payment of money only*, or upon any action or bill of debt for *rent*, or upon any *contract*, sued in any of the courts of record at *Westminster*, or in the counties-palatine of *Chester, Lancaster, or Durham*, or the courts of great sessions in *Wales*; nor (by statute 19 Geo. 3. c. 70. sect. 5.) for the reversing of any judgment, given in any *inferior* court of record, where the damages (that is, as it is conceived, where the damages laid in the declaration) are under 10*l*. [l] unless the person or persons,

[i] 2 M. & S. 474. *Spooner v. Garland*. Ibid. 476. *Hawkins v. Snags*. But the court will not infer that any delay was intended merely from a view of the proceedings, without an acknowledgment by the party, that the writ of error was sued out merely for delay. 5 East, 146. *Somerville v. White*. So leave was refused to take out execution, notwithstanding a writ of error, where it did not appear but that the declaration of the defendant, that he would sue a writ of error and delay plaintiff, was

made before any action brought. 4 M. & S. 331. *Baskett v. Barnard*. So a threat of bringing a writ of error for delay, uttered six months before the writ of error sued out, was held not sufficient to entitle the plaintiff below to execution, pending the writ of error. 7 Taunt. 537. *Redford v. Garrod*. 1 B. Moore.. 253. S. C.

[k] S. P. 3 B. Moore, 83. *Cleghorn v. Des Anges*. 1 Gow. 66. S. C.

[l] Extended to fifteen pounds by stat. 51 Geo. 3. c. 124. s. 3.

" in whose name or names such writ of
 " error shall be brought, with two suf-
 " ficient sureties, such as the court
 " wherein the judgment is given shall
 " allow of, shall first be bound, unto
 " the party for whom the judgment is
 " given, by recognizance to be acknow-
 " ledged in the same court in double
 " the sum adjudged to be recovered by
 " the former judgment, to prosecute
 " the said writ of error with effect, and
 " also to satisfy and pay, if the said
 " judgment be affirmed (or the writ of
 " error *non-prossed*. 19 Geo.3. c. 70.
 " s. 5.) all and singular the debts, da-
 " mages and costs, adjudged upon the
 " former judgment, and all costs and
 " damages, to be awarded for the de-
 " laying of execution." Ante, 72 c. d.

This statute extends to all manner of judgments as well by default, on demurrer, or *nul tiel* record, as after verdict; but is confined to the particular actions mentioned in it; and therefore it is holden, that it does not extend to actions upon the case on bills of exchange, &c. 2 Keb. 234. *Vernat v. Debuste*. S. C. cited 1 Show. 15. or to actions of debt on bond conditioned for performance of covenants, 2 Buls. 54.

[m] So the statute does not extend to actions of debt on bond conditioned for the payment of money, and also for the performance of all the covenants in a mortgage deed. 10 East, 407. *Butler v. Brushfield*. [But a covenant in a mortgage deed for the repayment of the money is a contract within the meaning of the statute. 3 Taunt. 382. *Buckney v. Metham*]. Nor to debt on bond conditioned to keep the plaintiff harmless from the payment of an annuity, and from all actions, suits, damages and costs which should be brought against him, or that he might sustain, by non-payment of the annuity. 1 Barn. & Cress. 316. *Flanagan v. Watkins*.

[n] Accordingly it was held in

Gilling v. Baker. S. C. cited 1 Show. 15. though one of the covenants be for the payment of money, and the action be brought for the non-performance of that covenant. Carth. 28. *Gerard v. Danby*. S. C. 1 Show. 14. 2 Keb. 131. *Callwood v. Ballard*. S. P. [m]; or for performance of an award. 2 Bulst. 54. 1 Show. 15; or to debt upon an account stated; 2 Bulst. 54. *Gilling v. Baker*. S. C. Yelv. 227. 1 Show. 15. 7 Term Rep. 449. *Alexander v. Biss*; or to debt for work and labour, goods sold and delivered, or money had and received, but only where it is brought on a specific contract. 1 Bos. & Pul. 249. *Ablett v. Ellis*. [n] Or to debt on a general bond of indemnity. 1 Show. 14. But where a person, who had entered into a bond, as surety for another, to pay a sum of money to a third person, took a counter-bond conditioned for payment of the money by the principal to such third person by way of indemnity, the court held it to be a case within the statute, and therefore bail was necessary; Com. Rep. 321. *Huddy v. Gifford*; and though *Parker* chief-justice, and *Pratt* J. inclined to the contrary in *Hammond v. Webb*, 10 Mod.

1 Taunt. 540. *Webb v. Geddes*, on the authority of the above cases, that bail in error is not necessary in actions of debt against the acceptor of a bill of exchange: (which action is maintainable, at least by the drawer, where he is also payee, and where the bill is expressed to be for value received. 1 B. & C. 674. *Priddy v. Henbrey*.) Nor for goods sold and delivered; nor for money paid, money lent, money had and received; nor on an account stated. And in the same case it was held, as it had been before in 2 East, 359. *Tryer v. Bridgman*, that if there be one count in the declaration for which bail in error is unnecessary, it is not necessary for any.

281. yet no judgment was given in it. Com. Rep. 323.

But bail was held not necessary in debt upon bond conditioned for the payment of such beer as the plaintiff should furnish a third person with, not exceeding 100*l*. 2 Str. 1190. *Thrall v. Vaughan*. S. C. 1 Wils. 19. It was resolved by all the judges, that bail is not requisite in a writ of error brought upon a judgment obtained in an action of debt upon a prior judgment. 3 Burr. 1548. *Bidleson v. Whytel*. S. C. 1 Black. Rep. 506; nor, as it seems, upon a judgment in an action of debt upon a recognizance of bail. 3 Burr. 1566. *Trinder v. Watson*. S. P. Barnes, 194. [o].

But bail is necessary in a writ of error on a judgment obtained in debt on bond conditioned for the payment of so much money as J. S. should declare to be due on an account stated by him, for the action is in substance grounded upon a bond made for the payment of money only. 1 Lev. 117. *Dean of St. Paul's v. Capell*. So there must be bail in a writ of error on a judgment obtained on a bottomree-bond; for the contingency having happened it is in every respect a bond for the payment of money only. 1 Str. 476. *Pitt v. Coney*. S. P. 6 Mod. 38. *Scot v. Brace*. See however 1 Show. 14. *Garrett v. Danby*. S. L. Comb, 105. See also 2 Str. 959. *Desbordes v. Horsey*. S. P. Barnes, 78. *Woods v. Armstrong*, 98. *Littleton v. Hanson*.

And where a bond was given by a third person, as a security for the payment of a debtor's creditors fifteen shillings in the pound by instalments upon

a liquidated amount of his debts, the court held it to be a bond for the payment of money only, and therefore bail was requisite in a writ of error on a judgment upon the bond. 2 Burr. 746. *Chauvet v. Alfray*, but this case seems to be contrary to *Thrall v. Vaughan*. 2 Str. 1190. above cited; and the ground of the decision, namely, that the 3 Jac. 1. c. 8. is a remedial law, and ought to be construed liberally, appears to be overruled by the opinion of all the judges in a subsequent case, viz. *Bidleson v. Whytel*, 3 Burr. 1545. above cited, who held that the statute ought rather to be taken literally than extended. So where a judgment in C. B. is affirmed on a writ of error in the K. B., or a judgment in the K. B. is affirmed in the exchequer chamber, new bail must be given on bringing a writ of error in parliament, although bail was put in on the first writ of error. 1 Salk. 97. *Tilly v. Richardson*. S. C. 2 Ld. Raym. 840. 7 Mod. 120. 1 Str. 527. *Colebrooke v. Diggs*. 8 Mod. 79. S. C.

The before-mentioned statute was extended to other actions by stat. 13 Car. 2. st. 2. c. 2. s. 9. by which it is enacted, "that no execution shall be stayed, in any of the courts aforesaid (that is, the courts which are mentioned in the statute 3 Jac. 1. c. 8.) by any writ, or writs of error, or supersedeas thereupon, after verdict and judgment, in any action of debt grounded upon the statute 2 Edw. 6. for not setting forth tithes, nor in any action upon the case upon any promise for payment of money, actions sur trover, actions of covenant, detinue, and trespass, unless such recognizance, and

[o] S. P. in 8 East, 240. *Dell v. Wild*, on the ground that the statute applies to obligations for the payment of money only; but a recognizance of bail is in the alternative, to pay or to render.

Bail is held to be unnecessary when a writ of error is brought upon a judgment on demurrer in *sci. fa.* suggesting fresh breaches under stat. 8 & 9 W. 3. c. 11. 1 Taunt. 168. *Sparkes v. O'Kelly*.

" in such manner as by the said act of
 " 3 Jac. 1. is directed, shall be first ac-
 " knowledged in the court where the
 " judgment is given." And by statute
 " 16 & 17 Car. 2. c. 8. s. 3. (made per-
 " petual by statute 22 & 23 Car. 2. c. 4.)
 " no execution shall be stayed in any of
 " the aforesaid courts (those mentioned
 " in 3 Jac. 1.) by writ of error, or su-
 " persedeas thereupon *after verdict* and
 " judgment in any action personal what-
 " soever, unless a recognizance, with
 " condition according to the statute
 " 3 Jac. 1., shall be first acknowledged
 " in the court where such judgment
 " shall be given; and further, that in
 " writs of error to be brought upon any
 " judgment after verdict in any writ of
 " dower, or in any action of *ejectione*
 " *firmæ*, no execution shall be stayed,
 " unless the plaintiff or plaintiffs in such
 " writ of error shall be bound unto the
 " plaintiff in such writ of dower, or
 " action of *ejectione firmæ*, in such rea-
 " sonable sum as the court to which
 " such writ of error shall be directed,
 " shall think fit, with condition, that if
 " the judgment shall be affirmed, or the
 " writ of error discontinued, in default
 " of the plaintiff or plaintiffs therein, or
 " the said plaintiff or plaintiffs be non-
 " suit in such writ of error, that then the
 " said plaintiff or plaintiffs shall pay
 " such costs, damages, and sum and

" sums of money, as shall be awarded
 " upon, or after such judgment affirmed,
 " discontinuance, or nonsuit." And
 " by section 4. " that the court wherein
 " such execution ought to be granted
 " upon such affirmation, discontinuance,
 " or nonsuit, shall issue a writ to in-
 " quire as well of the mesne profits
 " as of the damages by any waste com-
 " mitted, after the first judgment in
 " dower or in *ejectione firmæ*; and upon
 " the return thereof, judgment shall be
 " given and execution awarded for such
 " mesne profits and damages, and also
 " for costs of suit.—Sect. 5. Pro-
 " vided that the act shall not extend to
 " any writ of error to be brought by
 " any executor or administrator; nor
 " unto any action popular, nor unto any
 " other action brought upon any penal
 " law or statute, except actions of debt
 " for not setting forth tithes; nor to
 " any indictment, presentment, inqui-
 " sition, information, or appeal."

The two last mentioned statutes are
 confined to judgments *after verdict*; and
 do not extend, like the stat. of 3 Jac. 1.
 c. 8. to judgments by default, upon de-
 murrer, or *nul tiel record*; therefore a
 writ of error upon a judgment by any
 of these three last ways is a *super-*
sedeas without bail, in such actions as
 are not enumerated by the statute
 3 Jac. 1. [p]

[p] As to the nature and amount of
 the recognizance entered into by the
 bail, their justification, &c., see Tidd's
 Pract. 1197. et seq. The amount is in
 almost every case double the sum ad-
 judged to be recovered by the judgment
 on which the writ of error is brought,
 and unless it be so, the writ of error is
 no *supersedeas*: whence it appears,
 that the recognizance cannot be entered
 into with effect till the costs in the
 former judgment are taxed: and, con-
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sequently, if the plaintiff below is ap-
 prehensive that error will be brought
 for delay, he may waive his costs, and
 take out execution directly, and the
 subsequent allowance of the writ of
 error will be no *supersedeas*. 4 Taunt.
 288. *Doe v. Dyneley*, (where the ac-
 tion was ejectment, and the writ of ex-
 ecution a *habere faciās possessionem*).
 But this will be counteracted by taking
 the precaution of suing out the writ of
 error before final judgment is signed;

If there is a verdict and judgment for the plaintiff in a *scire facias* against bail, and they bring a writ of error, there must be bail, for a *scire facias* is a *personal action*, and therefore within the 16 & 17 Car. 2. c. 8. 2 Black. Rep. 1227. *Pulteney v. Townson*. And if an *executor* or *administrator* bring error on a judgment against him *de bonis propriis*, he must put in bail, in cases where it would be required of other persons. 1 Lev. 245. *Fitz-William v. More*. S. C. 1 Sid. 368. 2 Keb. 295. 371.

When the bail in error, if necessary, is complete, the next step to be taken by the plaintiff in error, is to *certify* the record, in order to which a transcript should be made, and sent with the writ of error and returned into the court above. When no bail is required, this is the first step that is taken, after the service of the allowance of the writ of error. *Tidd's Prac. K. B.* 1119. 2d. ed. And the plaintiff in error should regularly cause the transcript to be made by the time the writ of error is returnable, for the defendant in error cannot transcribe the record. 1 Wils. 35. *Anon.* If the record be not certified by that time, the defendant in error may give the plaintiff in error a rule to certify it, and then if he will not, the defendant may non pros the writ of error. *Cas. temp. Hardw.* 352. *Goodright v. Hugoson*. [g] See the form of the rule, *Tidd's Prac. Forms*, 481.

On a writ of error in the king's bench on a judgment in the common pleas, or other inferior court, in an adverse suit,

the record itself is supposed to be removed, that it may remain as a precedent, and evidence of the law, in similar cases. 2 Bac. Abr. 202. F. N. B. 45. F. 7th edit. But in the cases of a fine, the transcript only is removed. 1. H. 7. 20. a. F. N. B. 45, 46. 7th ed. 1 Salk. 337, 338. *Winchurch v. Belwood*. 341. *Fazacharly v. Baldo*. 1 Roll. Abr. 752. (P). pl. 1, 2, 3, 4. Dy. 89. b. This distinction however is not attended to in practice; for on all writs of error returnable in the king's bench, *Cowp.* 843. *Vicars v. Haydon*. 2 Roll. Rep. 233. *Mason v. Denny*, as well as in the exchequer chamber, 2 Str. 837. *Rutter v. Redstone*. *Doug.* 352. *Lloyd v. Skutt*, note (3). 2 Ld. Raym. 1570. 1571. *Tully v. Sparkes*, or house of lords, 1 H. 7. 19, 20. *Flourdeu's case*. Dy. 375. a. Cro. Jac. 341, 342. *Haydon v. Godsalve*. S. C. 2 Buls. 163, 164. Sir T. Raym. 5. *Dethick v. Bradbourne*, it is usual to send only a *transcript* of the record, and not the record itself.

The chief-justice of the common pleas generally signs the return, though it does not seem necessary; but he never seals it. 2 Str. 1063, 1064. *Blackwood v. South Sea Company*. *Cas. temp. Hardw.* 344. S. C. When a writ of error is brought in parliament, on a judgment in the king's bench, the chief-justice goes in person into the house of lords, with the record itself and a transcript, which is examined and left there; and the record is brought back again into the king's bench, and if the judgment be affirmed, that court may grant exe-

5 East, 146. *ad finem. Somerville v. White*: because in such case the time for putting in bail runs from the *taxation of the costs*. 5 Taunt. 672. *Blackburn v. Kymer*. Ante, 101 g. n. [d].

[g] But no costs are allowed thereon. *Tidd's Practice*, 1204. 7 East, 111.

Salt v. Richards. Or the plaintiff in error may non pros his own writ, without carrying over the transcript to the court of error; 1 M. & S. 104. *Milborn v. Copeland*; and in this case also the defendant in error will not be entitled to his costs.

cution itself. 1 Roll. Abr. 753. pl. 10. On a writ of error from the common pleas the chief-justice certifies only the body of the record; for the original and judicial writs remain with the officers, and are never certified but when error is assigned for want of them. Cro. Eliz. 84. *Robbert v. Andrews*.

After the transcript has been returned and filed, 1 Ld. Raym. 329. *Acourt v. Swift*, the plaintiff in error may in the court above move to amend the writ of error, or the defendant in error to quash it, or it may abate, or be discontinued. Great certainty was formerly required in making the writ of error agree with the record, and no defects therein were amendable; but now by statute 5 Geo. 1. c. 13. "all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record, by the respective courts where such writs of error shall be returnable." Since which it is become the practice to amend the writ of error, as a matter of course, without costs. 2 Str. 668. Ibid. 902. *Gardner v. Merrett*. S. C. 2 Ld. Raym. 1587. As to cases in which the court will amend, see 1 Str. 682, 683. *Lady Cass v. Title*. 2 Str. 892. *Sword-blade Company v. Dempsey*. Cowp. 425. *Verelst v. Rafael*. [r] Where judgment is signed in a term subsequent to that in which the writ of error was returnable, it is a fault not amendable by the statute, for it would be to amend contrary to the truth of the case. 2 Str. 807. *Wright v. Canning*. S. C. 2 Ld. Raym. 1531.

Or the defendant in error may move to quash the writ, which in general is for some fault or defect that is not amendable by the above statute: and

such application should be made, either to the court of chancery, from whence it issues, or to the court wherein it is returnable. Doug. 350. *Lloyd v. Skutt*. We have already shewn, that where there are several parties, who are aggrieved by a judgment, and the writ is brought by some or one of them only, the court will quash it: but where one of several parties to a judgment, who is not aggrieved by it, joins in bringing a writ of error, it may be amended by striking out his name, and will stand good for the other parties. 2 Str. 892. *Sword-blade Company v. Dempsey*. Cowp. 425. *Verelst v. Rafael*. And it may be quashed as to one judgment, and stand good for another; as where bail brought a writ of error as well on the judgment against the principal in the original action, as on the award of execution against them on a *scire facias*, the writ was quashed as to the judgment against the principal, because the bail cannot have error on the judgment against him, and stood good as to the judgment against them on the *scire facias*. 1 Ld. Raym. 328. *Burr v. Attwood*. S. C. Carth. 447. Lill. Ent. 225. 290. Costs are payable in all cases on quashing a writ of error, even though none were recoverable in the original action; 1 Str. 282. *Archbishop of Dublin v. Dean of Dublin*. Ibid. 606. *Cowper v. Ginger*. 2 Str. 834. *Rejindox v. Randolph*. Cas. temp. Hardw. 137. *Ratcliff v. Burton*: it being enacted by statute 4 Ann. c. 16. s. 25. "that upon quashing any writ of error for variance from the original record, or other defect, the defendant in error shall recover against the plaintiff issuing out such writ, his costs, as he should have had if judgment had been affirmed, and to be recovered in the same man-

[r] See also 5 Taunt. 62. *Jampaya v. de Payba*. 2 Smith. R. 259. *Barnard*

v. Guy. 1 Chit. Rep. 369. *Binns v. Pratt*. Tidd's Praet. 1206.

"ner;" which costs include those of quashing the writ of error. 2 Ld. Raym. 1403. *Ginger v. Comper*; unless where the writ is quashed by reason of the defendant in error having entered continuances on the roll until the term subsequent to the return of the writ of error, and then signed judgment, whereby the writ, as we have already seen, becomes void; in which case the plaintiff is not liable to costs on quashing it; 1 Str. 139. *Gould v. Coulthurst*; but the court will make the defendant in error pay the costs. 2 Str. 834. *Rejndoz v. Randolph*.

So a writ of error may abate; as where the plaintiff in error, or one of several plaintiffs in error, dies before errors assigned; in which case the defendant in error must sue out a *scire facias quare executionem non* against the executors in the former case, and the survivors in the latter, to revive the judgment, before he can sue out execution; for though in the latter case the death of one of the plaintiffs in error would have made no alteration of the record, if no writ of error had been sued out, because the executor of the deceased would not be liable to an execution by *fiery facias* or *capias ad satisfaciendum*, though he would to an *elegit*, yet a writ of error is a supersedeas, which continues until the court is apprised of the abatement of the writ by a *scire facias*. Yelv. 208. *Spencer v. Rutland*. 1 Salk. 261. *Howard v. Pitt*. S. C. Carth. 236. 1 Ld. Raym. 244. *Penoyer v. Brace*. S. C. 1 Salk. 319. Carth. 404. [s]. But if he die after

errors assigned the writ does not abate, but the defendant may join in error, and proceed to have the judgment affirmed if not erroneous, and, where there was only one plaintiff in error, must afterwards revive it against his executors; but a writ of error does in no case abate by the death of the defendant in error whether before or after errors assigned; 1 Ld. Raym. 439. *Wicket v. Cremer*. S. C. 1 Salk. 264. Yelv. 113. *Bromley v. Littleton*. Ibid. 208. *Spencer v. Rutland*; or of one of several defendants in error; but his death being suggested on the roll, the writ of error proceeds against the survivors: see the form of the suggestion, Lill. Ent. 217. If he die before, and the plaintiff will not assign errors, the executors of the defendant in error, or the surviving defendant, may have a *scire facias quare executionem non* to compel him; 1 Salk. 264. *Wicket v. Cremer*. Barnes, 482. *Wright v. Treweek*. Tidd's Prac. K. B. 1128, 1129. 2d edit.; or, if he die after, the executors, or surviving defendants, must proceed, as if the defendant were living, till judgment be affirmed, and then in case there was only one defendant in error, his executors must revive it by *scire facias*, but execution cannot be taken out pending the writ of error. Tidd's Prac. K. B. 1129. 2d edit. And in order to compel the executors or administrators to join in error, the plaintiff may sue out a *scire facias ad audiendum errores* against them, 1 Vent. 34. *Anon*. 1 Salk. 264. *Wicket v. Cremer*, either generally or by name,

[s] See also 7 East, 296. *Lord Kinneir v. Lyall*, S. P. as to a single plaintiff. But a writ of error does not abate by the death of one of several plaintiffs; 1 B. & A. 586. *Clarke v. Rippon*; for the 8 & 9 W. 3. c. 11. s. 7. applies to writs of error: and it will be

observed, that the cases cited above were all decided previously to the passing of that statute. In case of such a death, the defendant in error should suggest it on the roll, and give a rule to the surviving plaintiff to assign the errors. Ibid. 587.

though the better way seems to be to sue it out generally. 2 Buls. 230, 231. *Husley v. Harrison*. The writ of error becomes ineffectual if the chief-justice die before he has made his return; and the defendant in error may take out execution by leave of the court; but if he do it without, the execution is irregular. Barnes, 201. *Cranborne v. Quennel*, *Olorenshaw v. Stanyforth*, and *Hages v. Thornton*. If, however, the return be signed by the chief-justice in his lifetime, the writ does not abate, but the record may be certified afterwards. 1 Sid. 268. *Allen v. Shaw*. Tidd's Prac. K. B. 1130. 2d edit.

A writ of error in the house of lords does not now determine by the *prorogation* of parliament, though formerly it was otherwise; 1 Vent. 266. *Anon.* 1 Lev. 165. *Prichard's case*. 2 Lev. 93. *Goffon v. Sedgwick*; or even upon a *dissolution*; but all appeals and writs of error continue in the same state they were then in. Sir T. Raym. 383, 384. Com. Dig. Parliament, (P. 2.)

So a writ of error may abate by the act of the party, as where it is brought by a feme-sole, who afterwards marries, the writ abates *by her marriage*, and the court will give the defendant in error leave to take out execution, though she and her husband have brought a second writ of error. 2 Str. 880. *Buller v. Pinn*. Ibid. 1015. *Jenkins v. Bates*. But bankruptcy is no abatement of a writ of error. 1 Term Rep. 463. *Kretzman v. Beyer*.

If the writ of error be not quashed or abated, the plaintiff in error should, after the record is certified, forthwith proceed to assign his errors; and if he do not, the defendant in error in order to compel him, should in the king's

bench sue out a writ of *scire facias quare executionem non*; 3 Burr. 1792. *Knox v. Castello*. 2 Term Rep. 17. *Sambridge v. Housley*. 2 Leon. 107: pl. 135. See the form of the writ; Tidd's Prac. Forms, 425. 2 Leon. 107. pl. 135.; and if, upon such writ, the plaintiff in error does not assign errors, but suffers judgment to pass by default upon *scire feci*, or two *nils* returned, no errors assigned afterwards shall prevent execution, 2 Bac. Abr. 216. Carth. 40, 41. *Mosely v. Cocks*. [†]

And as the *scire facias* is only used as a method to compel an assignment of errors, the plaintiff in error is not permitted to plead to it; 2 Sell. Prac. 376.; but if errors are assigned, before the expiration of the rule to appear to the *scire facias*, all further proceedings upon it are stayed.

But it frequently happens that the errors assigned are the want of an original writ, or warrant of attorney, or some other matter necessary to render the record perfect or complete; which is termed "*alleging diminution*" of the record. For if the judges of the common pleas, or other judges, upon a writ of error, do not certify all the record, the party that sues the writ of error may allege diminution of the record, and pray a writ to the justices who certified the record before to certify the whole of it. 2 Bac. Abr. 204. F.N.B. 57, 58. 7th edit. A man cannot allege diminution, contrary to the record which is certified, as if on a writ of error the judgment certified is, that the defendant should be "*in misericordia*," the defendant in error cannot allege for diminution, that the record is *quod capiatur*, because it is contrary to the record certified. 2 Bac. Abr. 204. 1 Roll. Abr.

[†] And the defendant may in such case take out execution, though he has served the plaintiff with a rule to assign

errors which has not expired 15 East, 204. *Wright v. Peckham*.

764. (L.) pl. 1, 2. Nor can diminution be alleged upon a writ of error brought on a judgment in an inferior court; 1 Sid. 40. *Redding's case*, 147. *Smith v. Smith*, 364. *Rex v. Knott*. 1 Salk. 266. *Hale v. Clare*; though it may be alleged in error upon a judgment in *Wales*, and counties-palatine; 1 Sid. 147. 364.; for they are superior courts. See 1 Saund. 73. *Peacock v. Bell*.

An assignment of error is in the nature of a declaration, and is either of error in fact, or error in law. The former consist of matters of fact, not appearing on the face of the record, which, if true, prove the judgment to have been erroneous; as, that the defendant in the original action, being under age, appeared by attorney; that a *feme* plaintiff or defendant was under coverture, at the time of commencing the action; or that the plaintiff or defendant died before verdict or interlocutory judgment. See the form of assigning those errors in fact and issues thereon, in Tidd's Prac. Forms, 485—490. An assignment of errors in fact must conclude with a verification; 1 Burr. 410. *Sheepshanks v. Lucas*. Carth. 367. *Walker v. Stokoe*; and in assigning the death of the defendant in error before verdict, or interlocutory judgment, the assignment ought not to conclude in the common way, but by praying a *scire facias ad audiendum errores* against the executor or administrator of the defendant in error. See the form of such an assignment in Tidd's Prac. Forms, 487, 488.; and if the sheriff return that he is alive, then he may come in and plead in *nullo est erratum*; Carth. 339. *Edmonds v. Probert*; or his attorney may appear for him, and say that he is alive; 1 Sid. 93. *Dove v. Darcen*. Sir T. Raym. 59. S. C.; but if the sheriff return, that he has warned the executor or administrator, that will be a sufficient ground for the

court to proceed to examine errors. Carth. 389. *Edmonds v. Probert*.

Errors in law are common or special. The common errors are, that the declaration is insufficient in law to maintain the action, and that the judgment was given for the plaintiff instead of the defendant, or *vice versa*. Tidd's Prac. K. B. 1141. and Prac. Forms, 490. 502. 507, 508. Special errors are the want of an original writ, bill, or warrant of attorney, or other matter appearing on the face of the record, which shews the judgment to have been erroneous. Tidd's Prac. K. B. 1141. Prac. Forms, 490, 491. 493. 503. The plaintiff may assign several errors in law, but only one error in fact; F. N. B. 45. E. 7th edit.; and he cannot assign error in fact, and error in law together, for they are distinct things and require different trials. 2 Bac. Abr. 217. 2 Ld. Raym. 883. *Burdett v. Wheatly*. 1 Str. 439. *Jeffry v. Wood*. 1 Roll. Abr. 761. (E.) pl. 1. It seems to be a general rule, that nothing can be assigned for error that contradicts the record; 1 Roll. Abr. 758. pl. 8. 1 Str. 684. *Helbut v. Held*. S. C. 2 Ld. Raym. 1414. 1 Wils. 85. *Bradburn v. Taylor*, 2 Bac. Abr. 217. Cro. Jac. 28. *Hudson v. Banks*. 1 Lev. 76. *Molins v. Welby*. Ibid. 310. 1 Salk. 262. *Lampton v. Collingwood*; or was for the advantage of party assigning it; 2 Bac. Abr. 220. 1 Str. 382. 8 Rep. 59 a. *Beecher's case*. 5 Rep. 39. b. F. N. B. 48. (F.) 7th edit. Ante, 46.; or that is aided by appearance, 1 Roll. Abr. 779. (L.) pl. 1, 2. Cro. Eliz. 582. *Thoroughgood v. Scroggs*; or by not being taken advantage of in due time. 1 Roll. Abr. 782. (P.) pl. 1. 8. 2 Bac. Abr. 221. 2 H. Black. 267. 299. *Lonsdale v. Littledale*. Thus a man shall never assign that for error, which he might have pleaded in abatement. So if a *feme-covert* bring an ac-

tion in her own name by attorney, and the defendant pleads in bar to the action, he cannot afterwards assign the cover-ture for error. Carth. 124. *Coan v. Bowles*. So, where the sheriff who returns the panel was brother to him for whom the verdict passed, yet if the party does not challenge the array, it is no error. 1 Roll. Abr. 782. (Pl.) pl. 2. Bro. Error, 34. 2 Bac. Abr. 222. Where the assignment has been merely calculated for delay, the court have in some instances set it aside. 1 Str. 141. *Chartres v. Cusack*. 2 Str. 899. *Moore v. Goodright*. Lill. Ent. 228. in marg.

If the plaintiff assign for error the want of an original writ, bill or warrant of attorney, &c., or that it is bad in point of law, he should regularly take out a *certiorari* to verify his errors. Tidd's Prac. K. B. 1142, 3.; for it is a rule, that judgment cannot be reversed for want of an original writ, bill or warrant of attorney, nor for any supposed error or defect therein, without a *certiorari* to bring such original writ before the court; 9 Edw. 4. 32. b. Bro. Error, 90. S. C. 2 Ld. Raym. 1398. *Drowe v. Rose*. Ibid. 1441. *Graddle v. Tyson*. Cas. temp. Hardw. 118, 119. *Franklyn and Reeves*. Com. Rep. 115. *Sterling v. Tanner*. 2 Ld. Raym. 1047. *Davenant v. Rafton*; see the forms of the *certiorari*, Tidd's Prac. Forms, 492. 494, 504, 505. Thes. Brev. 68, 69, 70. 76. 2 Sell. Prac. 415, 416.

The want of an original writ is aided after verdict by statute 18 Eliz. c. 14. which has been extended, by an equitable construction, to the want of a bill upon the file; Hob. 130. *Wilson's case*: Ibid. 264. *Willis v. Woodhouse*. Ibid. 281, 282. *Earl of Clanrickard's case*: but not after judgment by de-

fault or confession; 4 Ann. c. 16. s. 2.; or upon demurrer, or *nul tiel record*. Therefore, if the want of an original after verdict be assigned for error, the defendant in error may confess it, by pleading in *nullo est erratum*; but if a writ of error be brought after a judgment by default, &c. it is usual for the defendant in error, if there be no original sued out, to present a petition to the master of the rolls, praying that the cursor of the county where the venue is laid, may be directed to issue an original with a proper return, which is ordered accordingly. — See the form of the petition, and *fiat* and order thereon, Tidd's Prac. Forms, 479, 480, 481. Sell. Prac. 418. [u]

The plaintiff in error can have but one writ of *certiorari*, a second writ being never granted to reverse, though it may to affirm a judgment; 2 Str. 765. *Merryfield v. Berrey*. Ibid. 819. *Bowers v. Mann*, S. P. But if it be certified on the plaintiff's writ, that there is no original, or warrant of attorney, or one that is bad, or warrants not the declaration, the defendant in error may, at any time before in *nullo est erratum* pleaded, make a suggestion that there is an original writ or warrant of attorney, or a good one, of a different term, or even of the same term with the *placita*, and pray a *certiorari* for certifying it; and if a good original be returned, the court will not enquire when it was filed; or if a bad original was before certified, they will disregard it, and apply the record to that which is good, and will support the judgment. Cro. Car. 91. *Howell John v. Thomas*. Cro. Jac. 277. *Smith v. Skipwith*. 1 Salk. 266. *Burnaby v. Sanderson*. 6 Mod. 174. S. C. 1 Roll. Abr. 765. pl. 8. Cro.

[u] But where the plaintiff below lays his venue in a county palatine, he cannot supply the want of an original in this manner, because there is no officer there

to grant it; and the court will not under these circumstances amend the declaration by changing the venue. 7 Taunt. 466. *Millington v. Goodwin*.

Jac. 130, 131. *Marham v. Pesrod*. Ibid. 597. *Johns v. Bowen*. Com. Rep. 118. 1 Salk. 267. *Burnaby v. Saunderson*. 2 Ld. Raym. 1476. *Shipman v. Lethieuller*. Tidd's Prac. K. B. 1148, 1149. [x] The plaintiff in error, after he has assigned his errors, may have a *scire facias ad audiendum errores* against the defendant, who thereupon may appear and plead *nullo est erratum*, or a release, &c. 2 Bac. Abr. 207. However, in practice it is usual for the defendant in error by consent, to take notice voluntarily of the assignment of errors; which consent is testified by his pleading *in nullo est erratum*, and then there is no occasion for a *scire facias ad audiendum errores*. Carth 41. *Moseley v. Cocks*; see the form of the *scire facias*. Thes. Brey. 229. 231. 236. 2 Crompt. 354. Tidd's Pract. Forms, 495. 497.

To an assignment of errors the defendant may plead or demur. Pleas in error are common or special. The common plea, or *joinder* as it is more frequently called, is *in nullo est erratum*; which is in the nature of a demurrer, and at once refers the matter of law arising thereon to the judgment of the court. Tidd's Prac. K. B. 1150, 1151.

If an error in fact be well assigned, and the defendant in error would put in issue the truth of it, he ought to deny the fact, and join issue on it, and have it tried by the country, and not say *in nullo est erratum*; for by so doing he acknowledges the fact alleged to be true. 1 Roll. Abr. 763. (K.) pl. 2, Dyer 65. b. Sir T. Raym. 231. *Okeover v. Overbury*. 1 Lev. 294. *Grell v. Richards*. But if the defendant would acknowledge the fact to be as it is alleged,

and yet insist that by law it is no error, he ought to plead *in nullo est erratum*. 1 Roll. Abr. 763. (K.) pl. 3. But if an error be assigned that is not assignable, or be ill assigned, as that the court did not sit, or the defendant did not appear, *in nullo est erratum* is no confession, but shall be taken only for a demurrer. Sir T. Raym. 231. *Okeover v. Overbury*. 1 Lev. 311. *Cole v. Greene*. Cro. Jac. 521. *Haydon v. Mynn*. 1 Roll. Ab. 758. pl. 8. Cro. Eliz. 665. *Cross v. Tyrer*. *Piommer v. Webb*, cited in a note in 2 Ld. Raym. 1415. Fitzgib. 109, 110. S. C. 2 Bac. Abr. 218.

If error be alleged in the body of the record, *in nullo est erratum* is a good plea; for it puts the matter to the judgment of the court, the record being agreed to be so. 1 Roll. Abr. 763. (K.) pl. 4. citea 9 Edw. 4. 32. b. which see; S. C. Bro. Error, 93. So if error be alleged in a matter of record that is not of the body of the record, but in a collateral thing, as that there is no record of resummons, *in nullo est erratum* is a good plea; for if the plaintiff in the writ of error does not, before the plea is entered, allege diminution and pray a *certiorari*, and procure a return from the inferior court that there is not any resummons, the assignment is of no effect, but void, inasmuch as that is to be tried by the record itself; and no diminution can be alleged, after the plea of *in nullo est erratum* pleaded; and though the defendant in error would confess the error, yet the court ought not to reverse the judgment, until they are satisfied of the error by the record itself. 1 Roll. Abr. 764. pl. 5. which cites, also 9 Edw. 4. 32. b. S. C. Bro. Error, 93. If the plaintiff in error

[x] So a bill may be filed to warrant a judgment after the want of a bill has been assigned for error, for if there is a bill on the file of the proper term, the

court will not enquire how it came there. 1 Taunt. 125. *French v. Cook*. 2 H. Black. 606. *Parrot v. Spraggon*.

assigns error in fact and error in law, and the defendant in error pleads *in nullo est erratum*, it is a confession of the error in fact, and the judgment must be reversed; for he should have demurred for the duplicity, upon which the judgment would have been affirmed. 2 Bac. Abr. 218. Carth. 338, 339. *Edmonds v. Probert*. 2 Ld. Raym. 883. *Burdett v. Wheatley*. 1 Str. 439. *Jeffry v. Wood*. It is a general rule, that after the defendant in error has pleaded *in nullo est erratum*, no diminution can be alleged; Cro. Eliz. 84. *Robert v. Andrews*, Moor. 700. *Beare v. Beacher*. 1 Leon. 22. *Dayrel and Thinn*; and the reason is, because it is admitted by all the parties that it is a true and perfect record, and therefore neither party shall be permitted to contradict their own admission. F. N. B. 58. note (a) 7th edit. 1 Salk. 269. *Carlton v. Mortagh*. But no admission of the parties can, or ought to restrain the court from looking into the record before them. 1 Salk. 270. *Meredith v. Davies*. Therefore it is a general rule, that at any time pending a writ of error, whether before or after errors assigned, 1 Str. 440. *Bellew v. Scott*; or after *in nullo est erratum* pleaded, the court *ex officio* may award a *certiorari*. F. N. B. 58. note (a) 1 Roll. Abr. 764. (M.) pl. 4. 1 Salk. 269. *Carlton v. Mortagh*. 2 Ld. Raym. 1005. S. C. Cas. temp. Hardw. 118, 119. *Franklyn v. Reeves*. 2 Bac. Abr. 205. 1 Salk. 270. *Meredith v. Davies*.

When the plaintiff assigns for error the want of an original, or warrant of attorney, and the defendant comes in *gratis*, and confesses the matter assigned for error, by pleading *in nullo est erratum*, or a release, without putting the plaintiff to the necessity of suing out a *certiorari* to verify his errors; the court, for their own information, may award this writ, in order if possible to support the judgment. 2 Str. 907.

Berkley v. Howard. 1. Salk. 268. *Carlton v. Mortagh*. 2 Ld. Raym. 1005. S. C. Tidd's Prac. K. B. 1153, 1154. So if error is assigned in the original writ, and upon a *certiorari* granted an erroneous original is returned, upon which *in nullo est erratum* is pleaded, and afterwards the court, to inform their conscience, grants another *certiorari* for another original, and upon this a good original is returned, the court will intend this to be the original on which the judgment was given, and therefore ought to affirm the judgment. 1 Roll. Abr. 765. pl. 9. But though the court, *ad informandam conscientiam curiae*, will award a *certiorari* to affirm a judgment, they will never award one to reverse it, or make error. 1 Salk. 269. *Carlton v. Mortagh*. 2 Str. 765. *Merryfield v. Berrey*. Ibid. 819. *Bowers v. Mann*. Ibid. 907. *Berkley v. Howard*. Cas. temp. Hardw. 118, 119. *Franklyn v. Reeves*.

Special pleas to an assignment of errors contain matters in confession and avoidance, Tidd's Prac. K. B. 1154. as a release of all errors, or of all suits; 2 Bac. Abr. 225; or the statute 10 & 11 W. 3. c. 14. of limitations, namely, that the writ of error was not brought within twenty years after the signing of the judgment. 2. Str. 1055. *Street v. Hopkinson*. Cas. temp. Hard. 345. S. C. to which the plaintiff may reply, or demur, and proceed to trial or argument. Tidd's Prac. K. B. 1154. A release of errors contained in a warrant of attorney to confess a judgment is good, though given before judgment, provided the release be dated in the term of which the judgment is entered up. 2 Str. 1215. *Landon v. Pickering*. But where there are several plaintiffs in error, the release of one of them shall not bar the others. 6 Rep. 25. a. *Ruddock's case*. Cro. Eliz. 648, 649. S. C. Cro. Jac. 116. 117. *Blunt v. Sneddon*.

3 Mod. 135. *Hacket v. Herne*. In pleading a release, the defendant must lay a venue; but though it be ill pleaded, yet if there are no errors the court will affirm the judgment. 1 Salk. 268. *Carlton v. Mortagh*. S. C. 2 Ld. Raym. 1005. 6 Mod. 206. 2 Bac. Abr. 225.

Issue being joined in error, the proceedings are entered of record. Tidd's Prac. K. B. 1156.; and on a writ of error *coram nobis*, they must be entered on the same roll as the original judgment, or former writ of error, otherwise the whole would be discontinued, though after verdict. Cro. Eliz. 155. 281. *Yates v. Windham*. 1 Ld. Raym. 151. *Walker v. Stokoe*. Carth. 369. S.C. On a writ of error from the common pleas the entry is made on different rolls, intituled of the term the transcript is brought in. Tidd's Prac. K. B. 1156.; and begins with the writ of error and return, after which the proceedings in the common pleas are entered to the end of the final judgment; then follows the assignment of errors; and if it be of errors in law there is an entry of the joinder, with a continuance of *curia advisare vult*. See the form, post. 102. *Holdipp v. Otway*. See also as to the forms, 2 Sell. Pract. 412—417. Tidd's Prac. Forms, 310—515; or if it be of errors in fact, the plea and replication, &c. are next entered with an award of the *venire facias*. See the form, Tidd's Prac. Forms, 509, 510. and Imp. K. B. 602—612. 4th edit.

The common judgment for the defendant in error, whether the errors assigned be in fact or in law, is, that the former judgment be affirmed. See Tidd's Prac. Forms, 525. 527. 531. So on a

demurrer to an assignment of errors, in fact and in law, for duplicity, the judgment is that judgment be affirmed. Yelv. 58. *King v. Gosper*. 2 Ld. Raym. 883. *Burdett v. Wheatley*. 1 Str. 439. *Jeffry v. Wood*. For error in fact, the judgment is, that for the error aforesaid the judgment aforesaid be recalled, *revocetur*; 1 Roll. Abr. 805. pl. 9.; and for error in law, it is that the said judgment shall be reversed. 2 Bac. Abr. 230: see Tidd's Prac. Forms, 526. On a plea of release of errors found for the defendant, the judgment is, that the plaintiff be barred of his writ of error, and not that the judgment be affirmed; for as the pleading of a release is a confession of errors, that would be to affirm an erroneous judgment; 1 Show. 50. *Kirle v. Clifton*. 1 Str. 683. *Dent v. Lingood*. Ibid. 127. *Cunningham v. Houston*; and though in the last case Aston's Entries, 339. were cited, where the entry is *quod judicium affirmetur*, yet the court paid no regard to it. And for the same reason on a plea of the statute of limitations found for the defendant, the judgment is the same as where a release is pleaded. 2 Str. 1055. *Street v. Hopkinson*. S. C. Cas. temp. Hardw. 345.

A judgment, being an entire thing, cannot regularly be reversed in part and affirmed for the residue. 1 Salk. 24. *Cutting v. Williams*. S. C. 2 Ld. Raym. 825. Carth. 235. *Parker v. Harris*. 1 Ld. Raym. 255. *Richards v. Cornford*. 2 Bac. Abr. 227, 228. [y] As, where several damages were given on two issues, and an entire judgment was entered for both, and one of the issues was erroneous, the judgment was reversed for the whole. Cro. Jac. 424. *Lloyd*

[y] But see 6 Taunt. 645. *Everard v. Paterson*, which was an action of debt; the first count on an award, and the second on an *insimul computassent*; and in

which the court of exchequer chamber on error reversed the judgment as to the first count, and affirmed it as to the second.

v. Pearse. So, where A. brought an action on the case against B. for words spoken of him, and for causing him to be indicted, &c., and the jury found a verdict for the plaintiff as to both, with *entire* damages; yet it being afterwards holden that the words were not actionable, the judgment was reversed *in toto*. 2 Bac. Abr. 228. in marg.

Where there are several dependent judgments, and the principal one is reversed the other cannot be supported; as if a man bring an action of debt upon a judgment, and recover, if the first judgment be reversed, the second judgment which is founded upon it must necessarily be reversed too. 2 Bac. Abr. 229. But the reversal of the last judgment will not affect the first: as if a judgment be given against *executors* in an action of *debt*, and, after a *scire facias*, judgment is given against them to have execution of their proper goods, and a writ of error is brought upon both judgments, in this case if the first judgment be good, and the last erroneous, the last only shall be reversed, and the first shall stand. 1 Roll. Abr. 776. pl. 11. 5 Rep. 32. a. *Pettifer's* case. See the whole proceedings in the writ of error in this case. Co. Ent. 268. b. — 272. a. S. P. 2 Str. 1055. *Street v. Hopkinson*. Cas. temp. Hardw. 345. S. C.

So, if there be several distinct and independent judgments, the reversal of one shall not affect the other; as in an action of account, if judgment be given *quod computet*, and afterwards auditors are assigned, and upon the account judgment is also given against the de-

fendant with damages and costs, and a writ of error is brought upon both judgments, and the last judgment only is found erroneous, in this case the last judgment only shall be reversed, and not the first, but that shall stand in force, for they are two distinct and perfect judgments, for the first judgment *is ideo consideratum est quod computet, et defendens in misericordia*. 1 Roll. Abr. 776. pl. 11. So if the judgment consists of several distinct and independent parts, it may be reversed as to one part only; as for costs alone; 1 Str. 188. *Bellw v. Aylmer*. 2 Ld. Raym. 893. *Green v. Waller*. S. C. cited 2 Ld. Raym. 1534.; or damages in *scire facias*; 2 Str. 808. *Henriques v. Dutch West India Company*. 2 Ld. Raym. 1532. S. C.; or for damages and costs in a *qui tam* action. 4 Burr. 2018. *Frederick v. Lookup*.

If judgment be given for the plaintiff, and *the defendant* bring a writ of error upon which the judgment is reversed, the judgment shall only be to reverse the former judgment [z]; for the writ of error is brought only to be ceased and discharged from that judgment. But if judgment be given for the defendant, and *the plaintiff* bring a writ of error, the judgment shall not only be reversed, but the court shall also give such judgment as the court below should have given: for the writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, in which the erroneous judgment was given. 1 Salk. 262. *Parker v. Harris*.

[z] More correctly, "the judgment shall be the same as that which the court below ought to have given." For in 12 East, 668. *Gildart v. Gladstone*, a judgment of C. B. for the plaintiffs upon a special verdict in *assumpsit* having been reversed, the court held that

the defendant was entitled not only to a judgment of acquittal, but also for the costs of his defence in C. B., being the same judgment which the court below ought to have given: the distinction mentioned in the learned Serjeant's note is therefore done away.

1 Roll. Abr. 674. pl. 1, 2, 3. post. 256, 257. *Green v. Cole*. Carth. 254. *Baker v. Lade*. 4 Burr. 2156. *Clements v. Waller*. If judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for the defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count, the court of error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record. 6 Term Rep. 200. *Campbell v. French*.

Where a judgment against the plaintiff is reversed, on a writ of error brought in the king's bench, that court, having the record before them, may in all cases give such a judgment as the court below should have given, and if necessary, may award a writ of inquiry to assess the damages. And so where a judgment is given against the plaintiff in the king's bench on a *special verdict*, by which the damages are assessed, the exchequer chamber, or house of lords, may in case of reversal, give a new and complete judgment for the plaintiff to recover the damages. But where the damages are not assessed, as when judgment is given on *demurrer*, the exchequer chamber, or house of lords, not having the record before them, but only a transcript, cannot give a new and complete judgment, but only an interlocutory one *quod recuperet*, and the transcript being remitted, the court of king's bench will award a writ of inquiry, and give final judgment. 1 Salk. 403. *Phillips v. Berry*. S. C. 1 Ld. Raym. 910. Carth. 319. Skin. 514. Cro. Jac. 206. *Faldowe v. Ridge*. S. C. Yelv. 75.

When the judgment is affirmed, or writ of error *non-prossed*, the defendant in error is entitled to *damages and costs* by the statutes 3 H. 7. c. 10. and 19 H. 7. c. 20. By the former of these

statutes, reciting that writs of error were often brought for delay, it is enacted, "that if any defendant, or tenant, against whom judgment is given, or any other, that shall be bound by the said judgment, sue, before execution had, any writ of error to reverse any such judgment, in delay of execution, that then if the same judgment be affirmed, or the writ of error be discontinued, in default of the party, or the plaintiff in error be nonsuited therein, the person or persons, against whom the writ of error is sued, shall recover his costs and damages, for his delay and wrongful vexation in the same, by the discretion of the justice" (that is, the court. Doug. 561. n. 5.) "before whom the writ of error is sued." The latter of the above statutes recites the former, and that it had not been put in force, and enacts; "that it shall be thenceforth duly put in execution." It has been holden, that these statutes do not extend to a writ of error sued out after execution served; because it is not in delay of execution. Cro. Jac. 636. *Eardley v. Turnock*. Gilb. C. P. 275. And that damages and costs shall be given in error, for delay of execution, although none were recoverable in the first action; Cro. Eliz. 617. *Graves v. Short*; costs being allowable in every case where a writ of error is brought before execution executed. Ibid. 659. *Penruddock v. Clerk*. Cro. Car. 145. Anon. 1 Str. 262. *Archbishop of Dublin v. Dean of Dublin*. 2 Str. 1084. *Ferguson v. Rawlinson*. S. C. Andr. 113. S. C. cited 6 Vin. 337. pl. 9; in marg. and 338. pl. 12. in marg.; and the court over-ruled Cro. Car. 425. *Smith v. Smith*. Sir T. Raym. 134. *Winne v. Lloyd*. S. C. 1 Lev. 146. and 1 Vent. 88. *Foot v. Berkhly*, which were cited to the contrary. And where an executor brought a writ of error on a judgment after a *devastavit*, the court held that he

ought to pay costs on affirmance. 2 Str. 977. *Carwell v. Norman*. S. C. 2 Barnard. K. B. 450. [a]

On a writ of error returnable in the king's bench, that court, on motion, will order the master to compute interest on the sum recovered, by way of damages, from the day of signing final judgment below down to the time of affirmance, and to add the same to the costs taxed for the plaintiff in the original action. Doug. 752. *Zinck v. Langton*. note 3; and see 2 Str. 931. *Bishop of London v. Mercers' Company*. 2 Burr. 1096, 1097. *Bodily v. Bellamy*. S. C. 1 Blac. Rep. 267; 268. 2 Term Rep. 70. *Entwistle v. Shepherd*. And if by the course of the court of error, interest is not computed in the allowance of costs, on the affirmance of the judgment, the jury in an action on the judgment may give interest by way of damages from the time of signing the original judgment. 2 T. Rep. 75. *Entwistle v. Shepherd*. But in debt on a recognizance against bail in error in the exchequer chamber, the bail are not liable to pay interest between the time of the original judgment and affirmance; tho' they are liable to interest from the time of the affirmance. 4 Burr. 2137. *Welford v. Davidson*. 2 Term Rep. 57. *Frith v. Lerous*. In the exchequer chamber the officer is bound to allow double costs to the defendant in error on the affirmance of a judgment; but it is a matter entirely in the discretion of the

court to allow interest on the affirmance. 2 H. Blac. 284. *Shepherd v. Macreth*. [b] In the court holden before the lord chancellor and treasurer and judges (under the 31 Edw. 3.) for examining erroneous judgments given in the court of exchequer, the practice is to give interest from the day of signing judgment to the day of affirming it there, computed according to the current, and not the strictly legal, rate of interest. 2 Burr. 1097. *Bodily v. Bellamy*. In the house of lords, sometimes very large, sometimes very small costs are given, according to the nature of the case, and the reasonableness or unreasonableness of litigating the judgment of the court below. *Ibid*. And in order to mitigate costs, the plaintiff will sometimes withdraw his errors. Tidd's Prac. K. B. 1169.

By statute 13 Car. 2. st. 2. c. 2. sect. 10. if any person shall prosecute any writ of error, for reversal of any judgment given *after verdict*, and the judgment shall be affirmed, he shall pay unto the defendant in the said writ of error, his double costs. [c] And by statute 8 & 9 W. 3. c. 11. s. 2. "If
" at any time any person or persons shall
" commence or prosecute in any court
" of record any action, plaint, or suit,
" wherein upon any demurrer, either
" by plaintiff or defendant, demandant
" or tenant, judgment shall be given by
" the court against such plaintiff or de-
" mandant; or if at any time after judg-

[a] And see 1. H. Black. 566. *Williams v. Riley*, that wherever executors, &c. are liable to pay costs in the original action, they are also liable in error.

[b] For instances when the court of exchequer chamber will allow interest, see Tidd's practice; 1239; 1; 2. Interest is not allowed in K. B. to an avowant in replevin for rent arrear, in whose

favour judgment has been given below and affirmed in error, because the statutes which give defendants in error costs, are held to be confined to judgment recovered by the original plaintiffs below. 10 East, 2. *Golding v. Dias*.

[c] This statute is held to be confined to cases where the judgment affirmed is for the plaintiff below. 5 East, 545. *Baring v. Christie*.

"ment given for the *defendant*, in any
 "action, plaint, or suit, in any court of
 "record, the plaintiff or demandant
 "shall sue any writ of error, to annul
 "the said judgment, and the said judg-
 "ment shall be afterwards affirmed, the
 "writ of error discontinued, or the
 "plaintiff be nonsuit thereon, the de-
 "fendant in error shall have judgment
 "to recover his costs against the plain-
 "tiff or demandant, and have execu-
 "tion for the same by *capias ad satis-*
"faciendum fieri facias or *elegit*." [d]
 But none of the before mentioned sta-
 tutes gives costs upon the *reversal* of a
 judgment; and therefore when a judg-
 ment is reversed, each party must pay
 his own costs. 1 Str. 617. *Wyvil v.*
Stapleton. [e]

After affirmance, or *non-pros* for
 not assigning errors, the defendant
 in error may take out *execution* for
 the sum recovered in the original
 action, as well as the damages and
 costs in error or for these alone,
 by *fieri facias*, *elegit*, or *capias ad satis-*
faciendum. See the form of the *fieri*
facias. Lill. Ent. 583. 588. Thes.
 Brev. 117, 118. 122. Tidd's Prac.
 Forms, 534—539.; of the *elegit*, Lill.
 Ent. 571. Thes. Brev. 97.; and of the
capias ad satisfaciendum, Thes. Brev.
 42, 43. 51. 53, 54. Lill. Ent. 544, 545.
 Tidd's Prac. Forms, 539, 540.

An execution, being founded on the
 record, must issue out of the court
 where the record is; and therefore where
 the judgment is affirmed on a writ of error
coram nobis, or from the common pleas,
 or an inferior court, returnable in the
 king's bench, the record remaining
 there, or being supposed to be removed
 thither, the execution may issue immedi-
 ately out of that court. Cowp. 848. *Vi-*

cars. v. Haydon. Tidd's Prac. K.B. 1171.
 But where a judgment is affirmed in
 the exchequer chamber, or house of
 lords, to which a transcript only is re-
 moved, it is necessary that the trans-
 cript should be *remitted* to the king's
 bench, where the record is, and out of
 which the execution must issue, before
 the issuing thereof, or at least before it
 is returnable. Palm. 186, 187. *Potter*
v. Turner. Cowp. 843. Tidd's Prac.
 K. B. 1171. See the entry of the *re-*
mittitur of proceedings to the king's
 bench after affirmance in the exchequer
 chamber; Tidd's Prac. Forms, 528.;
 and the like after affirmance in the
 house of lords. Ibid. 532, 533.

If judgment be *reversed*, the party
 shall be restored to all that he has lost
 by occasion of the judgment, and a
 writ of restitution shall be awarded.
 Cro. Jac. 699. *Sympton v. Juxon*.
 Where the plaintiff has execution and
 the money is levied and paid, and that
 judgment is afterwards reversed, the
 party shall have restitution without a
scire facias, because it appears on the
 record that the money is paid, and
 there is a certainty of what was lost;
 otherwise where it was levied but not
 paid; for there must then be a *scire*
facias suggesting the matter of fact,
viz. the sum levied, &c. 2 Salk. 588.
Anon. See the form of a *scire facias*
quare restitutionem non. Lill. Ent. 641.
 650. Tidd's Prac. Forms, 541, 542.
 And see the form of a writ of restitu-
 tion after judgment reversed. Tidd's
 Prac. Forms, 543, 544.

(2) So in *Bull v. Steward*, 1 Wils. 255.,
 which was an action for an escape on
 mesne process out of an inferior court
 against the bailiff, it was holden that
 the defendant could not take advantage

[d] This statute is confined to judg-
 ments given on *demurrer* for defendants
 below. 10 East, 4. *Golding v. Dias*.

[e] See also 5 East, 49. *Bell v.*
Potts, S. P.

of any error in the process below, of which the defendant below might have availed himself. And in *Bently v. Donnelly*, 8 Term Rep. 27. in an action on the case for rescuing a debtor taken upon mesne process sued out of the palace court, it was decided that it was not a sufficient ground to arrest the judgment, that it was not alleged that the cause of action in the inferior court arose within the jurisdiction, or that it was not alleged that the party below did not appear at the return of the writ. S. P. Cro. Eliz. 165. *Ognell v. Paston*. Cro. Jac. 3. *Weaver v. Clifford*. 280. *Mackaley's case*, 288, 289. *Burton v. Eyre*. Dalt. Sher. 563.; for as on the one hand an erroneous process is a sufficient justification to the sheriff in an action of false imprisonment brought against him for arresting and imprisoning the party under it, for the sheriff is not to examine the legality of it; so on the other hand the sheriff cannot, to an action against him for the escape of a person arrested by him under an erroneous process, take advantage of the error in the process to deliver himself from being answerable for the escape. [f] And where in debt against the sheriff for the escape of one in execution, the declaration very unnecessarily stated that A. obtained judgment in K. B. against B. and then died intestate, and the plaintiff took out administration by an inferior ordinary, namely, the archdeacon of B., and brought a *scire facias* upon that judgment, upon which he had judgment to have execution, and thereupon a *capias ad satisfaciendum* issued against B. upon which he was taken, and in custody of the defendant, who was sheriff, &c.

and afterwards escaped; and upon *nul debet* pleaded and a verdict for the plaintiff, it was moved in arrest of judgment that it appeared in the declaration, upon the plaintiff's own shewing, that the administration was granted by a peculiar jurisdiction, whereas it likewise appeared that the intestate had *bona notabilia* in another diocese, namely, the judgment at *Westminster*; for which reason the administration granted by a peculiar jurisdiction by the archdeacon, was merely void; and if so, then the judgment obtained upon the *scire facias* was utterly void; and then an action of escape would not lie against the sheriff for the escape of a prisoner taken upon a void judgment; for if there were no judgment against B. there was no cause to detain him in prison. To which it was answered and so resolved, *that it was only error*, of which the sheriff could not take advantage in an action for an escape brought against him; and the difference was where the judgment was merely void, or where it was only erroneous; and that depended on another distinction, namely, where the court in which the judgment was obtained had cognizance of the cause, and where not; for in the first case, if the plaintiff obtain a judgment, and by his own shewing had no cause of action, yet because the court had jurisdiction of the cause, this is only an erroneous and not a void judgment; but it is otherwise where the court had no jurisdiction of the cause; but in the present cause the court had cognizance of the cause, and therefore the matter was only error. Carth. 148. *Gold v. Strode*. 3 Mod. 324. S.C. [g]

[f] But in justifying under process of an inferior court, it is necessary to allege in the plea, that the plaintiff levied for a cause of action arising with-

in the jurisdiction of the court. 4 Taunt. 50. *Evans v. Munkley and another*.

[g] So in an action against the sheriff for an escape, where the circumstances

were, that the sheriff, after having arrested a defendant on a *ca. sa.* (in which there was not any *non-omittas* clause,) within a liberty where particular officers had the exclusive privilege of executing all process, suffered him to go at large before his removal from the liberty: it was contended, that as the sheriff had no right to arrest the party

within a privileged place, no action for an escape could lie; but the court held, that though the arrest was wrongful, as against the bailiff of the liberty, yet the sheriff having once taken the party, was bound to keep him in custody, and consequently, was liable to an action for the escape. 3 B. & A. 502. *Piggot v. Wilkes.*

Case 18.

Holdipp versus Otway.

[102]

Trin. 21 Car. II. Regis. Rot. 1161.

Writ of error from the common pleas to the king's bench.

OUR lord the king has sent, to his beloved and trusty Sir *John Vaughan* knt., his chief justice of the bench, his writ close, in these words, to wit; *Charles* the second, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to our beloved and trusty Sir *John Vaughan* knt., our chief justice of the bench, greeting; because in the record and proceedings, and also in the giving of judgment, in a plaint which was in our court before Sir *Orlando Bridgman* knight and baronet, and his companions, then our justices of the bench, by our writ between *John Otway* esq. and *Henry Holdipp*, late of *Overton* in the county of *Southampton*, executor of the will of *Cornelius Dowse* gent., lately called *Cornelius Dowse* of *Overton* in the county of *Southampton*, for that the said *Henry* should render to the said *John* 68*l.*, as it is said, manifest error hath intervened to the great damage of the said *Henry*, as by his complaint we are informed: we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then you send to us distinctly and openly, under your seal, the record and proceedings aforesaid, with all things concerning the same, and this writ, so that we may have them in 15 days from the day of *St. Martin*, wheresoever we shall then be in *England*, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and according to the law and custom of *England*, ought to be done. Witness ourself at

Westminster, the 18th day of *November*, in the 20th year of our reign.

Shelberry.

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The chief justice's return.

The answer of Sir *John Vaughan* knt. the chief justice within named. — The record and proceedings of the plaint, whereof mention is within made, with all things concerning the same, I send to our lord the king wheresoever, &c. at the day within contained, in a certain record to this writ annexed, as within I am commanded.

Pleas at *Westminster* before Sir *Orlando Bridgman* knight and baronet and his companions, justices of our lord the king of the bench, of the term of the *Holy Trinity*, in the 19th year of the reign of our lord *Charles* the second, by the grace of God of *England, Scotland, France* and *Ireland*, king, defender of the faith, &c. Roll. 792.

London to wit, *Henry Holdipp*, late of *Overton* in the county of *Southampton* gent., executor of the will of *Cornelius Douse* gent. lately called *Cornelius Douse* of *Overton*, in the county of *Southampton*, was summoned to answer *John Otway* esq. of a plea, that he render to him 68*l.* which he unjustly detains from him, &c. And whereupon the said *John*, by *Richard Buckett* his attorney, says, that whereas the said *Cornelius* in his life-time, to wit, on the 24th day of *November*, in the year of our lord 1650, at *London*, in the parish of *St. Botolph, Bishopgate*, within the ward of *Bishopgate*, by his certain bill, which, sealed with the seal of the said *Cornelius*, the said *John* brings here into court, the date whereof is the same day and year aforesaid, acknowledged himself to owe and be indebted to the said *John* in the said sum of 68*l.* which said sum of 68*l.* the said *Cornelius* by the said bill covenanted and agreed to pay to the said *John* and his assigns, as soon as several bills of charges of the said *Cornelius* expended in prosecuting several suits at law and in equity for Mr. *Robert Riggs* of *Fareham* in the county aforesaid deceased, and for *Margery Riggs*, late of *Winchester* in the said county, widow, deceased, should be audited, debated and settled by two attornies indifferently to be chosen by both parties, to examine and state the account of the said bills of charges, the said *John Otway* satisfying and paying the said *Cornelius* his proportionable part, namely one third part of the said bills to be in form aforesaid debated and settled as by the said bill more fully appears. And the said *John Otway*, protesting (1) that he the said *John*, from the

Debt upon a
bill obligatory.

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(1) A protestation is defined to be, being concluded by any matter alleged, a saving to the party who takes it from or objected against him on the other

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time of making the bill aforesaid hitherto was and yet is ready to perform all things on the part of him the said *John Otway* by the bill aforesaid to be performed, and protesting that there was not, from the time of making the said bill, any

side, upon which he cannot take issue. Plow. 276. b. *Graysbrook v. Fox*. Finch L. 359. 366. Or, as expressed by Lord Coke, it is a safeguard, which keeps the party from being concluded by the plea he is to make, *if the issue be found for him*. Co. Lit. 124. b. Doc. Plac. 295. And it is of two sorts; first, when a man pleads any thing which he dares not directly affirm, or cannot plead for fear of making his plea double; as if, in conveying to himself by his plea a title to land, the defendant ought to plead divers descents from several persons, but dares not affirm that they were all seised at the time of their death; or, although he could do so, it would make his plea double to allege two descents, when one descent would be a sufficient bar; then the defendant ought to plead and allege the matter, interlacing the word "protesting," thus, *protesting that such a one died seised, &c.* and *this* the adverse party cannot traverse. The other sort of protestation is, when a person is to answer two matters, and yet by law he can only plead to one of them, then in the beginning of his plea he may say, *protesting, or not acknowledging such part of the matter to be true, and adds, "but for plea in this behalf, &c."* and so take issue, or traverse, or plead to the other part of the matter; and by this means he is not concluded by any of the rest of the matter which he has by protestation so denied, but may at another time take issue upon it. Reg. Plac. 70, 71. The proper place in the plea for the protestation, according to the usual and regular form of pleading, is after the words, "*that the (plaintiff)*" "ought not to have his action aforesaid" "maintained against him, because,"

Plow. 276. b. *Graysbrook v. Fox*. A protestation may be taken in a replication; as where in *assumpsit* for work and labour, and an *insimul computasset* for 5*l.* to pay when he should be thereto required, the defendant pleads, that it was agreed between him and the plaintiff, that the defendant should give, and the plaintiff should accept, a bill of 5*l.* in satisfaction of what was due to him, and that he did accept such bill according to the said agreement; and the plaintiff replies, *protesting* that he made no such agreement, *protesting also*, that there was no such bill given, for plea says, that it was not under seal; this replication is good. 5 Mod. 136. *Taylor v. Baker*. However, though a protestation may be taken in a replication, yet it is doubtful whether the protestations were properly taken in the last mentioned case; for they seem to be repugnant to the plea which admits the agreement and the giving of the bill in satisfaction; and a protestation that is repugnant to, or inconsistent with, the plea is holden not to be good. Bro. Protestation, 1. 5. Plow. 276. *Graysbrook v. Fox*. As where to an appeal of *Mayhem*, the defendant takes by protestation that if the plaintiff had any hurt or mayhem, it was from his own assault, and pleads that he was not mayhemed, nor had any mayhem, the protestation is bad for repugnancy to the plea. Keilw. 95. a. S. P. Cro. Eliz. 815. *Southcot v. Bennet*. Plow, 48. a. So an idle and *superfluous* protestation is not good; as where in an action by the executor of A. the defendant makes protestation that A. did not make a will, and also that A. did not make the plaintiff executor, the 2d protestation that A. did

sum of money due to the said *Cornelius* upon any bill of charges by him expended in prosecuting any suits at law or in equity, for the said *Robert Riggs*, or the said *Margery Riggs* deceased, the said *John Otway* in fact says that neither

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not make the plaintiff executor is superfluous; for if he made no will, it is included that he did not make the plaintiff executor. Plow. 276. *Graysbrook v. Fox*. But it is holden that a superfluous or repugnant protestation does not vitiate the plea, though it be shewn for cause of demurrer; for the intent of the protestation is that the party may not be concluded in another action. Com. Dig. Pleader (N.) And indeed the ground of the decision in the before mentioned case of *Taylor v. Baker* was, that a note or bill given in satisfaction, if it be not under seal, is not good; See Com. Dig. Pleader (2. G. 10.); therefore it was unnecessary for the court to give any opinion upon the propriety or formality of the protestations. In like manner, that which is the ground of the party's suit, cannot be taken by protestation, for it may be denied by answer, and issue may be joined upon it; as in detinue by the executor of A., the defendant cannot take by protestation that A. did not make the plaintiff his executor, for it is the ground of the suit, and utterly destroys the plaintiff's action; and that which is the effect of the party's suit cannot be taken by protestation. Plow. 276. *Graysbrook v. Fox*. Doc. Plac. 296. So where in an action upon the case, the plaintiff declared that the custom of the parish was that the parson should keep a bull and boar, and that the defendant was parson and the plaintiff an inhabitant of the parish, and the defendant had not kept a bull or boar, &c.; the defendant took the custom by protestation, and pleaded not guilty; the court held, that the protestation to the custom was not good, because it

was the ground and substance of the action, according to *Graysbrook v. Fox*. Moor. 355, 356. *Yelding v. Fay*. So where an information was brought against the inhabitants of the county of M. for not repairing L. bridge, which by the information was alleged to be an ancient bridge, and time out of mind had been repaired by the inhabitants of the county: the defendants, protesting that it was not an ancient bridge, for plea said, that it was lately erected by the king for the benefit of his mills: and upon demurrer the court held that for this cause, and also because the defendants did not shew who was bound to repair it, the plea was ill. Cro. Car. 365. Case of *Langforth Bridge*. See also 3 Wils. 109, 110. 116. *Godfrey v. Saunders*. A protestation is perfectly inoperative in the pleading in which it is used, it neither admitting, nor denying any thing in that suit.

Where one pleads a plea, and takes another matter by protestation, and the issue is found against him, the protestation is of no service; Bro. Protestation, 14.; it being a rule, that a protestation does not avail the party that takes it, if the issue be found against him; but only prevents a conclusion, where the issue is found for him, unless it be a matter which cannot be pleaded. Finch L. 359. or on which issue cannot be joined. Plow. 276. b. *Graysbrook v. Fox*: Co. Litt. 124. b. As where in an action by a villain against his lord, the lord makes protestation that he is his villain, and pleads another matter in bar; and if they are at issue, and it be found for the lord, there the villain continues a villain as before; but if the

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the said *Cornelius* in his life-time, nor the said *Henry*, after the death of the said *Cornelius*, produced or shewed, nor did either of them produce or shew, any bill or bills of charges of the said *Cornelius* expended in prosecuting any suits at law or in equity, for the said *Robert Riggs*, or *Margery Riggs*, to be audited, debated, and settled according to the tenor of the said bill; whereby an action accrued to the said *John* to have and demand of the said *Cornelius* in his life-time, and of the said *Henry* after the death of the said *Cornelius* the said 68*l.* Yet the said *Cornelius* in his life-time, and the said *Henry* after the death of the said *Cornelius* (although often requested), have not, nor hath either of them, rendered the said 68*l.* to the said *John*, but to render the same to him have hitherto refused, and the said *Henry* still refuses to render the same to him, and unjustly detains the same; wherefore he says that he is worse and has damage to the value of 50*l.*, and therefore he brings suit, &c.

issue be found for the villain, then he is free, because the lord took not at the beginning *for his plea*, that the villain was his villain, but took it *by protestation*. The lord might have pleaded, that he was his villain, and issue might have been joined thereupon. Litt. sect. 193.

But where the matter *cannot be pleaded*, or *issue taken thereupon*, it shall be saved to the party protesting, though the issue be found *against him*. As where an infant brings an action of waste against his guardian, and appears by attorney, which no one, unless he be of full age, should do, if the guardian takes the *nonage* by protestation, it shall save him the wardship, *because he cannot plead it*. Finch L. 359. Bro. Protestation, 21. So in an information the defendant shall take by protestation, that it is insufficient in law. Plow. 1. *Reginer v. Fogossa*. So where in trespass the plaintiff gives a name or quantity in his writ and declaration, as that the defendant broke his close, viz. 20 or 30 acres of land, &c. the defendant cannot vary or give another name, or

quantity, but must say by protestation, that the land is called B., or that it contains another quantity, and for plea that the place is his freehold. Bro. Protestation, 12. Trespass, 366. So in a *quare impedit* by the king for the heir in ward, because A. the ancestor was seised and presented, and conveyed from A. to B. and from B. to C., and from C. to the heir, the defendant pleaded that no such B. ever was *in rerum natura*; but the plea was disallowed, because as the title is from A., and B. is only in the meane conveyance, and not the person in whom the presentation is alleged, the plea is not material; but the defendant, to prevent conclusion afterwards, may take it by protestation. Bro. Protestation, 22. But where a man makes protestation of a thing that is material, and the issue is found *against him*, he shall be concluded of all that is material in the record: for, as we have already in substance observed, that which is *material, issuable*, and may be *pleaded*, cannot be taken by protestation. Doc. Plac. 296.

And the said *Henry*, by *Edward Noel* his attorney, comes and defends the wrong and injury when, &c. and says nothing in bar, or preclusion of the said action of the said *John*: wherefore the said *John* remains against the said *Henry* therein undefended. Therefore it is considered that the said *John* recover against the said *Henry* his debt aforesaid, and his damages on occasion of the detention of the said debt to 50*l.*, by the court here adjudged to the said *John* with his assent, to be levied of the goods and chattels which were of the said *Cornelius* in the hands of the said *Henry* to be administered, if he have so much thereof in his hands to be adminstered, and if he have not, then the damages aforesaid to be levied of the proper goods and chattels of the said *Henry*; and the said *Henry* in mercy, &c.

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Judgment by default for the debt, and 50*l.* damages for the detention of the debt,

to be levied *de bonis testatoris si, &c. et si non, &c.* then the damages *de bonis propriis.*

Afterwards, to wit, on *Wednesday* next after three weeks of the *Holy Trinity* in this same term, before our lord the king at *Westminster*, comes the said *Henry Holdipp* by *Thomas Sturmy* his attorney, and immediately says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid was given for the said *John Otway* against the said *Henry Holdipp*, whereas by the law of the land of this realm of *England* the said judgment ought to have been given for the said *Henry Holdipp* against the said *John Otway*: therefore in that there is manifest error. There is also error in this, to wit, that no original writ, between the parties aforesaid, in the plea aforesaid, is filed, or remaining of record, in the custody of the *custos brevium* of our said lord the king of the bench aforesaid of the term of the *Holy Trinity*, in the said 19th year of the reign of our said lord the now king of *England*, &c.; therefore in that there is manifest error. And the said *Henry Holdipp* prays a writ of our said lord the king to be directed to *William Thursby* esq., *custos brevium* of our said lord the king of the bench, to certify to our said lord the king more fully the truth of the same; and it is granted to him, &c. Therefore the said *William Thursby* is commanded, that having searched the original writs of *London*, of the said term of the *Holy Trinity*, in the 19th year aforesaid, between the parties aforesaid, of the plea aforesaid being in his custody of record, what he should find therein, he certify to our said lord the king without delay wheresoever, &c. as fully and entirely as the same were before him, together with the said

Assignment of errors.

General errors.

Diminution alleged in the want of an original writ.

Plaintiff prays a writ of *certiorari* to the *custos brevium*.

Certiorari issued.

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*Scire facias ad
audiendum
errores.*

*Viccomes non
missi brevis.*

writ directed to him, &c. And the said *Henry Holdipp* prays the writ of our lord the king to warn the said *John Otway*, to be before our lord the king to hear the record and proceedings aforesaid; and it is granted to him, &c. by which it is commanded the sheriff of *London*, that by good and lawful men, &c. he make known to the said *John Otway* that he be before our lord the king in three weeks from the day of *St. Michael* wheresoever, &c. to hear the record and proceedings aforesaid, if, &c. and further, &c. the same day is given to the said *Henry*, &c. at which day before our lord the king at *Westminster* comes the said *Henry* by his attorney aforesaid; and the sheriff has not sent the writ. And thereupon the said *John* on the same day being solemnly called comes by his attorney; whereupon the said *Henry*, as before says, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, by alleging the said errors by him in form aforesaid alleged; and he prays that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c., and that the said *John Otway* may rejoin to the errors aforesaid, and he prays that the court of our lord the king here may proceed to the examination, as well of the record and proceeding aforesaid, as of the said matters above assigned for error.

Joinder in error.

And the said *John Otway* says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid; and he likewise prays that the court of our said lord the king now here may proceed to examine, as well the record and proceedings aforesaid, as the matters aforesaid above assigned for error, and that the judgment aforesaid may be in all things affirmed, &c. But because the court of our said lord the king here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid before our said lord the king until three weeks from the day of *St. Michael* wheresoever our said lord the king shall then be in *England* to hear their judgment thereon; for that the court of our said lord the king here is not yet advised thereof, &c. (And so it is continued from term to term). At which day before our said lord the king at *Westminster* come the parties aforesaid by their attorneys aforesaid; whereupon all and singular the premises being seen,

*Curia advisare
vult.*

Judgment re-
versed.

and by the court of our said lord the king now here more fully understood, and diligently examined, and as well the record and proceedings aforesaid, as the matter aforesaid above for error assigned, being seen, for that it appears to the court of our said lord the king now here, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error; it is considered that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, be reversed, annulled, and altogether held for nothing; and that the said *Henry* be restored to all things which he has lost by occasion of the said judgment, &c.

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Afterwards, to wit, on *Thursday* next after 15 days of *St. Martin* in the 30th year of the reign of our lord *Charles* the 2d now king of *England*, &c. before our lord the king at *Westminster* comes the said *Henry Holdipp* by *Thomas Sturmy* his attorney, and acknowledges that he has had restitution and satisfaction from the said *John* of all sums of money, which he the said *Henry* lost by occasion of the said judgment; therefore let the said *John* be quit of all such sums of money thereupon, &c.

Restitution and satisfaction acknowledged on the record.

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Holdipp executor of Dowse *versus* Otway.

Case 18.

Trinity, 21 Car. II. Regis. Rol. 1161.

ERROR, by *Holdipp* executor of *Dowse* plaintiff against *Otway* defendant, to reverse a judgment in an action of debt in the common pleas, in which *Otway* then plaintiff declared against *Holdipp* as executor, &c. upon a bill obligatory made by the testator 24th *November* 1650, whereby the testator acknowledged himself to be indebted to the plaintiff in 68*l.*, which he covenanted and promised to pay to the plaintiff, or his assigns, as soon as several bills of costs of the testator, expended in the prosecuting of several suits in law and equity for Mr. *Robert Riggs* and *Margery Riggs* deceased, should be duly audited, debated, and settled by two attornies to be indifferently chosen between them to examine and state the accounts of the said bills of costs, the plaintiff paying to the testator his proportionable part, that is to say, the third part of the said bills to be in form aforesaid debated and settled: And the plaintiff by protestation that he was always ready to perform, all things on his part, and also by protesta-

S. C. 2 Keb. 624. S. C. cited 2 H. Black. 178.

7 Term. Rep. 447.

In debt upon a bill obligatory, if the plaintiff has judgment by default, or confession, the course of K. B. is to tax the damages for the detention of the debt, as well as the costs, if the plaintiff will assent to it; but if he will not, he shall have a writ of inquiry of damages for the detention of the debt; but it is

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in the election of the plaintiff, and not of the defendant; and interest may be included in the damages. In debt upon a bill obligatory, for payment of money to the plaintiff as soon as several bills of costs should be debated and settled, it ought to appear in the declaration that the bills were settled, or that it was owing to some fault in the defendant that they were not settled.

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tion that there was not any sum of money due to the testator upon any bill of costs by him expended in prosecuting any suits for the said *Robert Riggs* and *Margery Riggs*, the plaintiff in fact said that neither the testator in his life time, nor the defendant upon his death, did ever shew or produce any bills of costs, expended in the prosecution of the said suits, to be audited, debated, and settled according to the tenor of the said bills, whereby an action accrued to the plaintiff to demand and have the said 68*l.* of the defendant: and upon this declaration the plaintiff had judgment by default in the common pleas; and because the bill obligatory, upon which the plaintiff had declared, was made so long before, the prothonotary taxed 50*l.* for interest and damages for the detention of the debt of 68*l.*: whereupon the judgment was entered in this manner, to wit, "Therefore it is considered that the said *John* (the plaintiff) recover against the said *Henry* (namely the defendant) his debt aforesaid, and his damages on occasion of the detention of the said debt to 50*l.* by the court adjudged to the said *John* with his assent, to be levied of the goods which were of the said *Cornelius* (that is, the testator) in the hands of the said *Henry* to be administered, if he have so much thereof in his hands to be administered, and if he have not, then the damages aforesaid to be levied of the proper goods and chattels of him the said *Henry*, and the said *Henry* in mercy, &c." And it was a very hard case upon the defendant, who in truth had no assets, and yet was bound by this judgment to pay the 50*l.* for the damages out of his own proper goods; wherefore he brought a writ of error into the king's bench.

And *Saunders* of counsel with the plaintiff in the writ of error moved, that it was error, because the court of common pleas had taxed damages on occasion of the detention of the debt, where the damages did not appear judicially to the court, but should have been inquired of by a jury upon a writ of inquiry. And although it appeared to the court what time was elapsed since the debt was first contracted, and since the making of the bill obligatory, and although as it may be said, they may compute the interest of the debt, yet it did not appear to the court what interest had been paid; and therefore he urged that in this case there ought to have been a writ of inquiry, and that taxing of the damages by the court was erroneous.

Sed non allocatur: for the whole course and practice of

both courts is, upon a judgment in *debt* by default or confession, to tax the damages on occasion of the detention of the debt, as well as the costs of suit; and it being *with the assent* of the plaintiff, which is always entered upon the record, as it is in this very case, shall conclude the defendant as appears by all the precedents in the books of entries. But if the plaintiff will not assent to it, then he shall have a writ of inquiry of damages on occasion of the detention of the debt, if he will; but it is in the election of the plaintiff, and not of the defendant; and if the court can with the assent of the plaintiff tax 20s. or other small sum for damages on occasion of the detention of the debt, for the same reason they may tax 20*l.*, or other greater sum for such damages, if they see cause; wherefore this exception was over-ruled. (2)

(2) See vol. i. 58. *b.* 2 Ld. Raym. 774. So in *Bruce v. Rawlins*, 3 Wils. 61, 62. on a motion to set aside the inquisition on a writ of enquiry for excessive damages, where judgment was suffered by default, in an *action of trespass* for breaking and entering the plaintiff's house, and opening and searching several boxes, and drawers, therein, *Wilmot* chief justice said, "This is an inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages." So where the plaintiffs obtained an interlocutory judgment in an *action of assumpsit*, and a writ of enquiry was awarded, *Wilmot* chief justice said, "The taking of the inquisition and entering final judgment were only the conclusion and necessary consequence of the interlocutory judgment, for the court themselves, if they had so pleased, might, upon the interlocutory judgment, have assessed the damages,

and given final judgment thereupon: and the inquisition is only a matter of course taken to inform the conscience of the court." 2 Wils. 372. 374. *Hewit v. Mantell*. So in *Thellusson v. Fletcher*, Doug. 316. *Buller* justice observed, "that writs of inquiry are often sued out in cases where they are not necessary; as for instance, in actions on covenants for payment of a sum certain;" and for this he cited this case of *Holdipp v. Otway*. And *Lawrence* justice, in *Blackmore v. Fleming*, 7 Term Rep. 446, 447., referred to this case of *Holdipp v. Otway*, with respect to the prothonotary's taxing interest by way of damages, and that it was at the plaintiff's option either to refer it to the prothonotary to do so, or have a writ of inquiry of damages. [a] In *Roo v. Apsley*, 1 Sid. 442. judgment was obtained in debt upon a judgment, and it was moved for the plaintiff that the court should tax the damages, namely,

[a] And accordingly, where a writ of enquiry was awarded on a judgment by default, in an action on bills of exchange, and afterwards final judgment was entered without its appearing that the sheriff had returned any inqui-

sition, on error the court of exchequer chamber affirmed the judgment; for the court below might assess the damages themselves. 4 Taunt. 148. *Gould v. Hammersley*.

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Then *Saunders* assigned an error in the declaration, that the plaintiff in the common pleas had not sufficiently entitled himself to his action for the 68l. on the bill obligatory mentioned in the declaration; for it was not to be paid until the bills of costs were debated and settled by two attornies to be indifferently chosen by the testator, and the plaintiff *Otway*; and *Otway* the plaintiff in the common pleas has averred that the testator had not shewn, or produced any bills of costs; which is nothing to the purpose; for he was not bound to shew or produce any bills except only to the two attornies to be chosen to examine and state them; but the plaintiff in the

interest, without a writ of inquiry, and after some doubt made by the chief justice, it was at last referred to the secondary to tax the damages. See 11 H. 7. 5. b. Bro. Default, 105. 1 Roll Abr. 571. (J.) pl. 1, 2, 3. 3 Leon. 213. *Ognell's* case. So where there was judgment by default in an action on the case on a promissory note, it was referred by the court of common pleas

to the prothonotary to ascertain the damages and costs, and calculate interest on the note, without a writ of inquiry. 1 H. Black. 252. *Rashleigh v. Salmon*. Ibid. 529. *Andrews v. Blake*. Ibid. 541. *Longman v. Fenn*. And the same thing was done in the king's bench in the case of *Shepherd v. Charter*, 4 Term Rep. 275. And it is now become the constant practice of both courts to do so. [b]

[b] And the same practice now prevails in the exchequer. 4 Price, 194. *Biggs v. Stewart*. So the court will refer it to the proper officer to compute what is due not only in actions on bills of exchange and promissory notes, but also in covenant for rent; 8 T. R. 410. *Byrom v. Johnson*. 6 Taunt. 356. *Campion v. Crawshaw*. 2 Marsh. 86. S. C.; or for mortgage money. 8 T. R. 326. *Berthen v. Street*.

But the rule cannot be obtained where the action is brought for an uncertain sum, which is not mere matter of figures, as on a foreign judgment. 4 T. R. 493. *Messin v. Lord Massarene*, or a bill of exchange for foreign money. 5 T. R. 87. *Maunsell v. Lord Massarene*, or on a bottomree bond. *Palin v. Nicholson*. E. 38. Geo. 3. K. B. Tidd, 589. See also 12 East, 420. *Napier v. Schneider*. 14 East, 622. *Denison v. Mair*. The rule has been granted where the plaintiff died after interlocutory judgment. 1 M. & S. 229. *Berger v. Green*.

And where the bill had been stolen out of the plaintiff's attorney's pocket, and no tidings of it obtained. 3 M. & S. 281. *Brown v. Messiter*.

It is not universally true that a judgment by default in debt is final, for in an action of debt on the statute of Edward 6th for tithes, or in debt for foreign money, there must be a writ of enquiry; per *Holroyd J.* 5 B. & A. 885. *Arden v. Connell*; in which case the court refused a *mandamus* to the judge of the palace court, who had supported his officer in signing interlocutory judgment only in an action of debt for use and occupation. Since it has been held that a plaintiff may recover in debt a smaller sum than he declares for, and may declare in debt on a quantum meruit, it should seem that a writ of enquiry is as necessary for the ends of justice in an action of debt, as in one of *assumpsit*.

common pleas ought to have averred, that there were two attornies chosen, and the testator did not produce the bills of costs to them to be settled; or that the plaintiff had chosen one attorney, and required the testator to choose another, to examine and settle the bills, which he refused to do; whereby it might have appeared to the court, that there was no fault in the plaintiff, but a fault in the testator. But now it does not appear upon the record, that the money is yet payable; for they were payable upon the settling of the bills of costs by the two attornies; and this does not appear to be done, nor that there was any fault in the testator why it was not done, and therefore the 68*l.* does not appear to be yet due according to the tenor of the said bill obligatory. And of this opinion was the whole court (3); whereupon a rule was given to reverse the judgment *nisi*, &c.; but *Jones* of counsel with the defendant in the writ of error said, that he could not maintain the judgment; and therefore he prayed that it should be reversed for the expedition of his client, who intended to bring a new action; wherefore the judgment was reversed absolutely.

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(3) This case is cited by *Eyre* chief justice, in *French v. Campbell*, 2 H. Black. 178., who says that every possible condition, upon which money is to become payable, must be performed, or must be dispensed with upon sufficient ground, before the money is demandable in an action; and in the declaration, in which it is demanded, it must appear, that the condition has been performed, if not literally, at least substantially; or that, by reason of some default in the opposite party, the performance of the condition has been prevented, which dispenses with that performance. And if there is a condition annexed to a writing obligatory for the benefit of the

obligor, and the obligee is by the terms of it to do the first act, he must do, or concur in doing, the first act, before he can demand the penalty. If a stranger is to do the first act, the obligee is to procure that stranger to do it, it being for his benefit; but if the obligee himself is to do it, the obligee cannot demand the penalty till he has done it; it is, with regard to him, in the nature of a condition precedent. See 7 Rep. 10. *Ughtred's case*. 1 Saund. 319, 320. *Pordage v. Cole*, and note 4. 1 Ld. Raym. 665. *Thorpe v. Thorpe*. 4 Bac. Abr. 6. *Hunlocke v. Blacklowe*. Post, 155. *Pesters v. Opie*. Post, 350.

Case 19.

Allen *versus* Rivington.

Hil. 21 & 22 Car. II. Regis. Rot. 802.

Ejectment.

Derbyshire,
to wit,

BE it remembered that on *Saturday* next after the octave of *St. Hilary* in this same term, before our lord the king at *Westminster* came *George Allen* by *Benjamin Taylor* his attorney, and brought here into the court of our said lord the king then there his certain bill against *Robert Rivington*, in the custody of the marshal, &c. of a plea of trespass and ejectment, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit; *Derbyshire* to wit, *George Allen* complains of *Robert Rivington* being in the custody of the marshal of the marshalsea of our lord the king before the king himself, for that whereas *Ann Harrison*, spinster, on the first day of *May*, in the 20th year of the reign of our lord *Charles* the second now king of *England*, &c. at *Rossen* in the said county, demised, granted, and to farm let, to the said *George*, four acres of land, and four acres of pasture with the appurtenances, lying and being in *Rossen* aforesaid in the county aforesaid, to have and to hold the tenements aforesaid with the appurtenances to the said *George* and his assigns, from the 20th day of *April* then last past, until the full end and term of five years then next following, and fully to be complete and ended; by virtue of which said demise the said *George* entered into the tenements aforesaid with the appurtenances, and was thereof possessed until the said *Robert* afterwards, to wit, on the said 1st day of *May* in the said 20th year of the reign of our said lord the king, with force and arms, &c. entered into the tenements aforesaid with the appurtenances in and upon the possession of him the said *George*, and ejected, expelled, and amoved the said *George* from his possession aforesaid, his said term therein being not yet ended; and the said *George* from his said possession thereof held and kept out, and still holds and keeps out; and other wrongs to him did against the peace of our said lord the now king, and to the damage of the said *George* of 10*l.* and therefore he brings suit, &c.

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Plea, not guilty.

And the said *Robert Rivington* by *William Frogatt* his attorney comes and defends the force and injury when, &c. and says that he is not thereof guilty, and of this he puts himself upon the country; and the said *George* thereof likewise,

&c. Therefore let a jury thereof come before our said lord the king at *Westminster*, on *Friday* next after the octave of the *Purification of the Blessed Mary**, and who neither, &c. to recognise, &c. because as well, &c. the same day is given to the parties aforesaid there, &c. Afterwards the process thereof is continued between the parties aforesaid of the plea aforesaid, by the said jury being respited between them, before our lord the king at *Westminster* until *Wednesday* next after 15 days of *Easter*† next coming, unless his majesty's justices assigned to take the assizes in the county aforesaid, shall first come on *Monday* the 22d day of *March*, at *Derby* in the said county, according to the form of the statute in such case made and provided, for default of jurors because none of them did appear. At which day before our lord the king at *Westminster*, come the parties aforesaid by their attorneys aforesaid; and the said justices of assize, before whom the said issue was tried, have sent here their record had before them in these words. Afterwards, that is to say, on the day and at the place within contained, before Sir *Thomas Tirrell* knt. one of the justices of our lord the king of the bench, and *Thomas Brome* serjeant at law, justices of our said lord the king, assigned to take the assizes in the county of *Derby*, according to the form of the statute, &c. come as well the within named *George Allen*, as the within-written *Robert Rivington*, by their attorneys within contained; and the jurors of the jury, whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, say upon their oath, that before the trespass and ejectment in the lands mentioned in the declaration within written, one *John Hiblin* was seised of the said lands in his demesne as of fee; and being so thereof seised, made his last will and testament in writing of the lands within-written (among other things) by the name of a certain intache, in these words, "I give and bequeath unto *Ann Harrison*, daughter of my son-in-law *Thomas Harrison*, my intache in *Hopefield*, if my son *Thomas Hiblin* happen to leave no issue male, after the decease of my wife: and if my son *Thomas Hiblin* have issue male, then my will is that the said *Ann* shall have *5l.* paid her only, in lieu of the said intache." And afterwards the said *John* died, having issue the said *Thomas Hiblin*, who had issue male of his body lawfully begotten one *Richard Hiblin*. And the jurors aforesaid upon their oath aforesaid further say, that

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RIVINGTON.

Ventre facias.

* The last day
of Hilary term.

† The first day
of Easter term,
being the return
day of the dis-
tringus.

Postea.

Special verdict.

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Ann the wife of the said *John Hiblin* survived the said *John*, and afterwards died; and that the said *5l.* mentioned in the said last will was offered to the said *Ann Harrison* after the death of the said issue male, and was refused by the said *Ann Harrison*. And the jurors aforesaid upon their oath aforesaid further say, that *Ann* and *Elizabeth Hiblin* are the sisters and heirs of the said *Richard*, and that the said *Richard*, the son of the said *Thomas*, died without issue male of his body lawfully begotten, and that the said *Ann Harrison* entered into the lands within written, and demised them to the within-named *George Allen* the plaintiff, by virtue thereof the said *George* entered into the lands within written, and was thereof possessed until the within written *Robert Rivington* entered in and upon the possession of the said *George* and ejected him from his possession in manner and form as the within-written *George* has within complained against him; and that the said *Robert Rivington* the now defendant, is the guardian of the said *Ann* and *Elizabeth Hiblin*, and entered for their use. But whether or not, upon the whole matter aforesaid, in form aforesaid found, the said *Robert Rivington* is guilty of the trespass and ejectment aforesaid, the jurors aforesaid are altogether ignorant, and pray thereupon the advice of the justices and court here: and if, upon the whole matter aforesaid, in form aforesaid found, it shall seem to the justices and court here, that the said *Robert Rivington* is guilty of the trespass and ejectment within written, then the jurors aforesaid upon their oath aforesaid say, that the said *Robert Rivington* is guilty of the trespass and ejectment within written, in manner and form as the said *George Allen* hath within thereof complained against him; and they assess the damages of the said *George Allen* on occasion of the trespass and ejectment aforesaid, besides his costs and charges by him about his suit in that behalf expended, to *6l.*, and for those costs and charges to *5s.* and *4d.*: but if, upon the whole matter aforesaid in form aforesaid found, it shall seem to the justices and court here, that the said *Robert Rivington* is not guilty of the trespass of ejectment aforesaid, then the jurors aforesaid upon their oath aforesaid say, that the said *Robert Rivington* is not guilty thereof; as he the said *Robert* has within in pleading alleged. And because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the afore-

*Curia advisare
vult.*

said *George Allen* that he be before our lord the king at *Westminster*, on *Wednesday* next after the octave of the *Holy Trinity*, to hear their judgment thereupon, for that the court of our said lord the king here is not yet advised thereof, &c. (and so it is continued until *Trinity* next following). Whereupon all and singular the premises being seen, and by the court of our said lord the king now here more fully understood, and mature deliberation being thereupon had, it is considered that the said *George Allen* do recover against the said *Robert Rivington* his said term yet to come of and in the tenements aforesaid with the appurtenances, and his damages by the said jury in form aforesaid assessed, and also 13*l.* 6*s.* 8*d.* for his costs and charges, by the court of our said lord the king now here adjudged of increase to the said *George Allen* with his assent; which said damages in the whole amount to 16*l.* 16*s.*; and let the said *Robert Rivington* be taken, &c.

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RIVINGTON.

Judgment.

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Allen versus Rivington.

Case 19.

EJECTMENT; the plaintiff declared of a lease made by *Ann Harrison* to him of several lands in *Rosson*, in the county of *Derby*; upon not guilty pleaded, the jury found a special verdict to this effect; they found that one *John Hiblin* was seised in fee of the lands in question, and so seised, by his last will in writing, devised them in this manner: "I give and bequeath unto *Ann Harrison* (the lessor of the plaintiff,) daughter of my son-in-law *Thomas Harrison*, my intache in *Hopefield*, if my son *Thomas Hiblin* happen to have no issue male, after the death of my wife; and if my son *Thomas Hiblin* have issue male, then my will is, that the said *Ann* shall have 5*l.* paid her only, in lieu of the said intache;" and that the devisor died seised, leaving issue the said *Thomas Hiblin*, who had issue male *Richard Hiblin*, and that *Ann* the wife of the devisor survived him, and afterwards died; and that the said 5*l.* mentioned in the will was tendered to

S. C. 2 Keb. 606.
1 Sid. 445.
In ejectment, if it appear by the record of a special verdict, that the plaintiff has a priority of possession, and a title is found for the defendant, the plaintiff shall have judgment. [a]

[a] See *contra*, Burr. 2484. *Roe v. Harvey*. 2 T. R. 749. *Doe v. Barber*. This case is evidently in direct contradiction to the well-established rule, that the plaintiff in *ejectment* must recover by the strength of his own title, without

any regard to the weakness of the defendant's. The word "*ejectment*" was probably used by mistake instead of "*ejectione firmæ*;" in fact, in Siderfin's report of this case the action is stated to be the latter.

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Ann Harrison the lessor of the plaintiff, after the death of the issue male, and was refused by her. And they further found that *Ann* and *Elizabeth Hiblin* are sisters and co-heirs of *Richard* the issue male, who died without issue. And then the jury found the entry of the lessor of the plaintiff, and the lease to the plaintiff, as in the declaration, and that the defendant, as guardian of *Ann* and *Elizabeth Hiblin* ousted him; and if upon the whole matter the defendant was guilty or not, the jury left it to the judgment of the court.

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And upon this special verdict three points were intended to be argued. 1. Whether the lessor of the plaintiff shall have an estate for life by the devise, because at the time of the death of the wife *Thomas Hiblin* had issue, although he died afterwards. 2. If the lessor of the plaintiff shall have an estate for life after the death of the issue male, then the second point was, whether the tender after the death of the issue male was good, or whether it did not come too late after the death of the issue male, and ought to have been made in the lifetime of the issue male. 3. Whether any tender at all of the *5l.* was requisite, or whether the lessor of the plaintiff was not put to a suit against the executor or administrator of the devisor for the *5l.* But the matter of law was never argued, because it appeared upon the record, that the lessor of the plaintiff had a priority of possession, and there was not any title found for the defendant; for though it be found that *Ann* and *Elizabeth Hiblin* were co-heirs to *Richard Hiblin*, the issue male, which was nothing to the purpose, yet it was not found that *they were heirs to the devisor*; and the estate tail, admitting it was so, appears to be spent by the death of *Thomas Hiblin* without heir male, and therefore they had no title. And then the priority of possession alone gives a good title to the lessor of the plaintiff against the defendant and all the world, excepting against the heir of the devisor. And it was said at the bar, that it was not a mistake in drawing the verdict, but the truth of the case was as contained in the verdict; therefore it was adjudged for the plaintiff.

But *Kelynge* chief justice seemed to be of opinion that it was a perfect estate tail in *Thomas Hiblin*, and that there was no necessity to tender the *5l.*, but the lessor of the plaintiff might have a remedy for it in the spiritual court against the executor or administrator of the devisor. And although it was said that perhaps there were no assets, he answered that it would not alter the case. *Quære tamen, &c.*

Coryton & others *versus* Lithebye.

Case 20.

Pasch. 22. Car. II. Regis. Rot. 331.

Cornwall, } **B**E it remembered that heretofore, to wit, in the
to wit, } term of St. *Michael* last past before our lord
the king at *Westminster* came Sir *John Coryton* bart. and
Richard Harvey by *Richard Goodenough* their attorney, and
brought here into the court of our said lord the king then
there their certain bill against *John Lithebye* in the custody
of the marshall, &c. of a plea of trespass upon the case, and
there are pledges of prosecution, to wit, *John Doe* and *Richard*
Roe, which said bill follows in these words, to wit: *Cornwall*,
to wit, Sir *John Coryton* bart. and *Richard Harvey* complain
of *John Lithebye* being in the custody of the marshal of the
marshalsea of our lord the king before the king himself, for
that whereas one *William Findge*, on the 20th day of *July*,
in the 9th year of the reign of our lord *Charles* the First late
king of *England*, &c. was seised of, and in, two water corn-
mills under one roof called *Castor* mills, within the manor of
Calliland in the county aforesaid, in his demesne as of fee.
And whereas also the said Sir *John Coryton*, on the 20th day
of *April*, in the year of our lord 1651, and continually from
thence hitherto hath been, and yet is, seised of two other
water corn-mills under one roof called *Frogwell* mills, within
the said manor, in his demesne as of fee. And whereas also
as well the said Sir *John Coryton*, as the said *William Findge*,
and all those whose estate they *respectively* had in the said
mills, have, from time whereof the memory of man is not to
the contrary, separately and *respectively* from time to time
sufficiently repaired and amended the mills aforesaid at their
own proper costs and charges, and kept them in repair, for
the grinding of the corn and grain, of all the tenants inhabit-
ing within the manor aforesaid, used and spent in their several
houses within the manor aforesaid; and also for the whole
time aforesaid have kept and maintained millers to grind such
corn and grain; and in consideration thereof, they the said Sir
John Coryton and *William Findge*, and all those whose estate
they *respectively* had of and in the several mills aforesaid, for
the whole time whereof the memory of man is not to the
contrary, have ground, and been accustomed to grind, at the
mills aforesaid, or one of them, all the corn and grain of all

Same precedent.
1 Mod. Ent. 181
A similar prece-
dent settled by
Saunders,
Brownl. Rediv.
63, 64. S. P.
Herne. 83, 84.

[113]

W. F. seised in
fee of two water
corn-mills.

and J. C. seised
in fee of two
other water
corn-mills.

W. F. and J. C.
immemorially
repaired and
kept in repair
their respective
mills, for grind-
ing the corn of
the tenants of
the manor spent
in their houses,

and in consider-
ation thereof
have immemo-
rially ground at
the said mill, or
one of them, all
the corn of all
the tenants of
the said manor
spent in their
houses,
and taken a cer-
tain toll for the
same,

CORYTON v. the tenants of the said manor of *Calliland* inhabiting within
LITHEBYE. the said manor, by them used and spent in their several
 houses within the said manor, and have had and taken, for
 the grinding of every bushel of such corn and grain so ground,
 one gallon from and out of every bushel of the said corn and
 grain, and so in proportion for a greater or less quantity,
 for toll for the grinding thereof (1). And the said *William*
Findge being seised of his mills called *Castor* mills, the said

W. F. demised
 his mills to
 plaintiff R. H.

(1) It is not necessary now, in an action for not grinding at the plaintiff's mill, to allege in the declaration, that the plaintiff was *seised* in fee, or of any other estate, of the mill, it being only matter of inducement; nor is it necessary to lay any *title* to the toll, or *consideration* for it, or any *custom* or *prescription* for the defendant, or the inhabitants and residents within the manor, to grind at the mill, as is done in this precedent; but it is holden to be sufficient for the plaintiff to declare generally upon his possession of the mill, by reason whereof he is entitled to the toll and culture of the corn and grain ground at the mill; and that the defendant dwells in such a house, and

ought to grind all his corn and grain, spent ground in his house, at the plaintiff's mill. Willes's Rep. 654. *Drake v. Wigglesworth*: the usual form of the declaration at present being, "For that
 "whereas the said (plaintiff) on the
 "day of in the year
 "of our Lord and long before
 "was, and continually from thence
 "hitherto has been, and still is, law-
 "fully possessed of and in a certain wa-
 "ter corn-mill with the appurtenances,
 "situate, standing, and being in the
 "parish of in the said county
 "of H. called mill, and the said
 "(plaintiff) by reason of his possession
 "thereof[a], for all the time aforesaid
 "of right had, and still of right ought to

[a] Although it is sufficient in actions of this nature to declare on the *possession*, yet if it be alleged that by *reason of the possession* the plaintiff is entitled, such an allegation is not supported by evidence of a parol licence or agreement by which the defendant permits the exercise of the right in question to the plaintiff; but does not legally grant and annex it to the thing possessed by the plaintiff: the allegation can only be satisfied by evidence of the right being legally appurtenant to the thing possessed either by showing an existing grant, or long usage from which a grant is presumed. 4 East, 107. *Fentiman v. Smith*. A licence to be exercised on land may indeed be granted by parol, inasmuch as it conveys no interest

in the land, as a licence to stack hay. Palm. 71. *Webb v. Paternoster*. 2 Roll. Rep. 152. S.C. Poph. 151. S.C. A licence to occupy a box at the opera. 7 Taunt. 374. *Taylor v. Waters*. 2 Marsh. 551. S. C. A licence to put a sky-light over the defendant's area, by which the plaintiff's window is darkened. 8 East, 308. *Winter v. Brockwell*. See also 4 M. & S. 562. *Rex v. Horndon on the Hill*, and 1 Barn. & Cress. 634. *Rex v. Hagworthingham*. An action will lie for an interruption to the enjoyment under such licence; and when acted upon it cannot be countermanded, at least not without putting the plaintiff in the condition in which he was before it was granted. See the above cases. A plea of licence otherwise than

William, on the said 20th day of *July*, in the said 9th year of *CORYTON v. LITHEBYE.*
the reign of the lord *Charles* the First, at *Lanceston*, in the
county aforesaid, demised his mills to the said *Richard*
Harvey for the term of 99 years, if *Samson Harvey, Agneta*

"have, toll of corn or grain ground in the said mill. And whereas also the said (defendant) for all the time aforesaid hath been, and still is, possessed of and in a certain messuage or dwelling house with the appurtenances situate, standing, and being in the parish aforesaid, in which said messuage or dwelling-house the said (defendant) during all the time aforesaid hath inhabited and dwelt, and by reason thereof for all the time aforesaid said *ought* to have ground, and still of right *ought* to grind at the said mill, all his corn and grain after the grinding thereof (or ground) used and spent in the said messuage or dwelling-house, and to pay to the said (plaintiff) for the grinding thereof a reasonable toll;" or, if the case is, that all the inhabitants of a manor are bound to grind at the plaintiff's mill, then, after alleging the plaintiff's possession of the mill, and his right to toll as above, it may be stated in this way, "and that during all the time aforesaid, all the tenants, inhabitants and residents within the said manor of S. *ought* to have ground, and still *ought* to grind, all their corn, grain, &c. (as the case may be) which by them, or any of them had been used, or spent, ground within the manor at the plaintiff's mills, and to have paid and yielded, and to pay and yield to the said (plaintiff) for the grinding thereof, a certain reason-

"able toll, and that the (defendant) is is a tenant, inhabitant and resident within the manor," and then assigning a breach for not grinding at the mill. But the custom must be proved at the trial, and enough proved to shew that it is a good subsisting custom, otherwise the plaintiff cannot recover. Willes's Rep. 657. This general way of declaring has been used for several years past; as, where in an action by a lessee of an ancient mill for not grinding there, the declaration stated, "that the plaintiff for all the time aforesaid *had and ought to have*, toll of grain and malt ground in the said mill; and that all the inhabitants being in any ancient messuage within the said manor and borough, *of right ought to grind* at the said mill, all their grain and malt after the grinding thereof spent in their said messuages, and to pay, for the grinding thereof, a reasonable toll;" and upon not guilty pleaded, there was a verdict and judgment for the plaintiff in the king's bench; and upon error brought in the exchequer chamber, it was objected, that the plaintiff had not set forth *any title* in his declaration to the toll, or any custom or prescription for the inhabitants of those ancient houses to bring their corn to be ground there; but by the opinion of all the court, the judgment was affirmed; for it is sufficient to say in this *possessory* action, that during the time

by deed, is not good in discharge of a covenant or other obligation by deed: as where to debt on bond conditioned that the defendant should not open a shop within a certain distance of pre-

mises demised to him by the plaintiff, the defendant pleaded the leave and licence of the plaintiff. 8 Taunt. 31. *Sellers v. Bickford*. Ibid. 596. *Cordment v. Hunt*.

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LITHEBYE.

Defendant a
tenant of the
said manor
dwelling within
the same.

[114]

Harvey, and Sanson Brent, or either of them, should so long live; by virtue of which said demise, the said *Richard* entered into the said mills called *Castor* mills, and was, and yet is, possessed thereof. And whereas also the said *John Lithebye*, on the said 20th day of *April*, in the said year of our Lord 1651, and continually from thence hitherto hath been, and still is, a tenant of the said manor, and possessed of a dwelling-house within the said manor, in which the said *John*

aforesaid, *he had, and ought to have* the toll, and that the inhabitants *ought* to grind. 2 Vent. 286—292. *Chapman v. Flexman*: see also Willes's Rep. 654. *Drake v. Wiglesworth*.

So also in other possessory actions, it is holden not to be necessary to allege in the declaration the precise estate which the plaintiff is seised of, or to lay any title, either by grant, or prescription, to the thing, which he is disturbed in, and hindered from enjoying. As where in an action on the case for a disturbance of a toll in a market, the plaintiff declared that L. B. by his indenture demised to the plaintiff the toll and profit of the fair and market days within the manor and town of T. for a certain term, and that the defendant disturbed and hindered him from taking divers pieces of wool within the manor and town aforesaid; and after verdict and judgment for the plaintiff, an exception was taken to the declaration, that the plaintiff declared of a demise made by L. B. but did not shew that L. B. was seised at the time of the demise; but the exception was disallowed by all the court, because the plaintiff is to recover damages only, and the right or title of the land does not come in question. Owen, 109. *Escot v. Lanreny*. So where in an action on the case stating that the plaintiff was seised in fee of the manor of H. and of a fair held there every Ascension day, and the defendant disturbed him to take toll; it was moved in arrest of judgment, that the declaration was not good, because

the plaintiff does not shew a title to the fair by grant or prescription, and therefore has not any cause of action: but this objection was over-ruled by the court, because it is only a conveyance to the action, and not any claim of the right, as in a *quo warranto*; and therefore the declaration is sufficient without a special title comprised therein. Cro. Jac. 43. *Dent v. Oliver*. So in an action by the owner of an ancient ferry against a person who erects a new ferry near to his, it is holden, that the plaintiff may declare on his possession, and need not set forth in his declaration that he keeps boats and ferrymen sufficient to carry passengers over. Willes's Rep. 508. *Blissett v. Hart*. So where, in an action on the case for stopping a water-course, the plaintiff declared that he was seised in fee of a mill, and had a water-course running in the defendant's land to the mill, and the defendant stopped the water-course, it was objected, that the declaration was insufficient, because it was not alleged therein that the mill was an ancient mill and the water-course an ancient water-course, and that the plaintiff did not prescribe to have a water-course in the defendant's land; but all the court held the declaration sufficient, and that the plaintiff might well maintain his action upon the case, *being lawfully in possession* and the stopping of the water was tortious, and a damage to his mill: and though he did not prescribe in a *que egrate*, it was not material, as it had been ruled divers times before. Cro.

Lithebye during the whole time last aforesaid hath dwelt. CORYTON v. Yet the said *John Lithebye* well knowing the premises, but ^{LITHEBYE.} contriving and fraudulently intending to deprive the said Sir ^{Breach.} *John Coryton* and *Richard Harvey* of the profits, which would

Car. 577. *Sands v. Trefuses*. It is not necessary to prove it to be an ancient mill; unless it be laid in the declaration to be so, for then it must be proved, or the plaintiff will be nonsuited. Carth. 85. *Heblethwait v. Palms*. For if a man has a water-course running through his ground, and erects a mill upon it, he may bring his action for diverting the stream, and not say *antiquum molendinum*; and on the evidence it will appear whether the defendant has ground through which the stream runs before the plaintiffs, and that he used to turn the stream as he saw cause; for otherwise he cannot justify, though the mill be newly erected. Per *Hale*. 1 Vent. 237. *Cox v. Matthews*. See also Palm. 290. *Heblethwait v. Palms*. S. C. Carth. 84. 4 Rep. 84. *Luttelly's case*. [b] And where, in an action upon the case for disturbance of a way, the plaintiff declared that he was, and still is, possessed of and in an ancient messuage with the appurtenances called *C. by reason whereof he had, and ought to have, a way through and over the defendant's land, and that the defendant stopped it up, and obstructed the plaintiff in the use of it; and upon a*

special demurrer shewing for cause that it did not appear by the declaration, how the plaintiff was entitled to the way, either by prescription or grant, it was objected, that it was said in the declaration that the defendant was possessed, and also it appeared by the declaration that the closes, upon which the way was claimed, were the defendant's lands, and therefore a title ought to be made to the way either by grant or prescription, though it would have been otherwise, if the action had been against a mere wrong doer; but notwithstanding these objections, the Court was of opinion, that the declaration was proper, and gave judgment for the plaintiff. 1 Lutw. 119. *Blockley v. Slater*. S. P. 2 Vent. 185. 186. *Warren v. Sainthill*. So, in the case of *Rider v. Smith*. 3 Term. Rep. 766., where in an action on the case for not repairing a private road leading through the defendant's ground, the declaration stated, that the plaintiff was possessed of a messuage, and by reason of his possession thereof, of right ought to have a way from his said messuage through and over a certain close of the defendant called the lane, and that the

[b] See also 6 East, 207. *Bealey v. Shaw*. And accordingly in 1 Price, 27. *Compton v. Richards*, it was held that the occupier of one of two houses built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case against the tenant of the other, for obstructing his window-lights by adding to his own building, however short the previous period of enjoyment by the

plaintiff. Neither is it necessary that the precise mode of enjoyment should have been always the same; for where in an action for a nuisance to a water-course by which the plaintiff's mill was worked, the plaintiff declared on his possession, not stating the mill to be an ancient one, it was held to be no defence that the plaintiff had within 20 years somewhat altered the wheels. 1 B. & A. 258. *Saunders v. Newman*.

CORYTON v. LITHEBYE. have accrued to the said Sir John and Richard for the grinding of the wheat and barley of the said John Lithebye used and spent in his house, he the said John Lithebye, on the 20th day of December in the 20th year of the reign of our lord Charles

defendant, *by reason of his possession of the said close, ought to have maintained and repaired, and still of right ought to maintain and repair, at his own proper costs and charges, the said way, but the defendant suffered it to be ruinous and out of repair; and upon a general demurrer to this declaration, it was objected that the defendant could only be bound to repair the way by some particular obligation; for it was settled, that the grantor of a private way over his close was not bound of common right to repair it, but the grantee, who has the use of the way, ought by the common law to repair it, for which* 1 Saund. 322 a. note (3), Doug. 745. 748. *Taylor v. Whitehead* were cited; therefore the declaration ought to have stated the particular obligation under which the defendant was bound to repair the way; and that possession of the land, over which the way went, did not constitute such an obligation; and the same distinction between the owner of the soil, and a wrong doer, was taken, as had been made in the case of *Blockley v. Slater*, before cited from *Lutwich*, namely, that declaring generally on possession was not sufficient against the owner of the soil, though it was against a wrong-doer. But it was answered and resolved by the court, that the distinction now no longer prevailed, and that this general mode of declaring had been allowed in both cases alike, for more than a century past. And Buller justice said, it was curious to observe the progress of the different decisions upon this subject; the present form of declaring grew by de-

grees; the first case upon the subject was *Holbach v. Warner*. Cro. Jac. 665., which was an action upon the case for not repairing fences, and the declaration stated, that the plaintiff was possessed of a close called H., and the defendant was possessed of a close called G., and that all the possessors of the defendant's close had used to make the hedges and fences between his (the defendant's) close and the river A., which ran between the plaintiff's and the defendant's closes, and that the defendant did not repair the hedges, &c. whereby the plaintiff's cattle escaped out of his close to the defendant's, and from thence to the close of one W. who sued and recovered in trespass: and on a motion in arrest of judgment after a verdict for the plaintiff, the judges differed in opinion, two judges holding one way, and one another, and the matter was adjourned. The next case in point of time was 1 Vent. 264. *Anon.*, where in an action upon the case the plaintiff declared that the defendant, who was the tenant and occupier of such a parcel of land adjoining to the plaintiff's, had time out of mind repaired such a fence; after verdict for the plaintiff, Holt moved in arrest of judgment that the prescription was laid in occupiers, and their estate not shewn, and that had been adjudged nought; but by the court, it is true, there have been opinions both ways; but it is good thus laid, for the plaintiff is a stranger, and presumed ignorant of the estate; but otherwise it is if the defendant had prescribed. Then came *Winford v. Wollaston*, 3 Lev. 266. which was an action on the case for the

the 2d., now king, &c. and before the day of exhibiting the bill of the said Sir *John Coryton* and *Richard Harvey*, did not grind at the mills of the said Sir *John Coryton* and *Richard Harvey*, or either of them, 100 bushels of wheat and 100

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disturbance of a way, in which the plaintiff declared that for four years last past he was seised in fee of a parcel of land adjoining to a meadow of the defendant called B., and being so thereof seised for the whole time aforesaid ought to have, enjoy, and use, a certain way through a certain gate of the defendant in B. to the plaintiff's close; and after judgment by default, and a writ of inquiry of damages, it was moved in arrest of judgment, that the plaintiff had not shewn any title by prescription or otherwise, and therefore not good. But *Pollexfen* C. J. and all the court *contra*; it is not substance, but form only, and good after judgment by default, or on a general demurrer; and some of them held it good in all cases, although shewn for cause of demurrer: and afterwards in another term between *Warren* and *St. Hill*, such a declaration was adjudged good upon demurrer. After that was the case of *Tenant v. Goldwin*, 1 Salk. 360., where in action on the case the plaintiff declared, that he was possessed of a messuage, and in a cellar, part thereof, was wont to lay coals, beer, &c.; that the cellar adjoined the defendant's messuage, and by a wall, which the defendant *ought to repair*, was separated and defended from the defendant's privy, and that for want of repairing this wall, &c.; the declaration in this general way was holden to be suffi-

cient. The last case was *Reg. v. Bucknall*, 2 Ld. Raym. 804, in which Lord *Holt* said, that, where a man is obliged to make fences against another, it is enough to say that *omnes occupatores* ought to repair, because it lays a charge upon the right of another, which it may be he cannot particularly know. See Com. Rep. 44. *Dorn v. Gashford*. However, though it be not necessary now in these possessory actions to lay a title in the declaration by grant or prescription, as used to be done formerly, yet the title or consideration *must be proved* at the trial, to entitle the plaintiff to recover; and perhaps the true reason why it is held not to be necessary to lay any consideration or title in the *declaration* is, that it is a matter of *evidence* only. Thus, in an action for not grinding at the plaintiff's mill, the plaintiff is bound to prove the custom to grind there, the defendant being subject to it, and the breach; and the defendant does enough if he disprove any of them. Doug. 223. *Cort v. Berbeck*.

It is to be observed that actions on the case for not grinding at the plaintiff's mill have been substituted in modern times in the place of the writ *de secta ad molendinum*, which formerly was the only method of trying questions of this sort. F. N. B. 285. 7th edit. Co. Ent. 641. [c]

[c] In 6 East, 438. *Tewkesbury v. Diston*. 2 Smith, 508. S. C., it was held that where the owners of a market had toll of all corn brought into the market to be sold, and there sold, no action on the case for a fraud on the market

would lie against the *buyer* of corn by sample in the market who refused to pay toll upon the corn so bought, and afterwards delivered in the town where the market was held; nor could the bulk be said to be brought into the

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Averment of the
existence of the
lease to R. H.

bushels of barley of the corn within the time aforesaid used and spent in the house of the said *John Lithebye* within the manor aforesaid, but the said *John Lithebye* for the whole time aforesaid did grind the said corn at some other mills; whereby the said *Sir John Coryton* and *Richard Harvey* have entirely lost the toll of the said corn to the damage of the said *Sir John* and *Richard* of 40l., and therefore they bring suit, &c. With this that the said *Sir John Coryton* and *Richard Harvey* will verify, that the said *Sampson Harvey* is still surviving and in full life, to wit, at *Lanceston* aforesaid in the county aforesaid.

Demurrer.

And now at this day, to wit, on *Wednesday* next after 15 days of *Easter* in this same term, until which day the said *John Lithebye* had leave to imparl to the said bill, and then to an-

market as represented by the sample, so as to give the plaintiffs a right to the toll. But an action on the case will lie against the seller. 2 Taunt. 120. *Tewkesbury v. Brichnell*; see also 4 T. R. 107. *Moseley v. Pierson*. A prescription to take toll on goods sold by sample in a market, and afterwards delivered in the town in which the market is held, is bad in law: for sales by sample are of modern introduction. 4 Taunt. 520. *Hill v. Smith*. The case had been before argued in K. B. 10 East, 476., but the judgment there was given upon motion for a new trial, merely on the question of the admissibility of certain evidence; the court declining to enter into the point of law which was on the record. So in 4 B. & A. 559. *Wells v. Miles*, it was held that a prescription for toll of corn brought into the town to be sold on a market day, whereof any part is pitched for sale in the market, is bad, inasmuch as there cannot be toll of any goods not brought into the market. Toll is not incident to a market; therefore the grantee of a market has no right to toll, unless it be expressly given him. 2 B. Moore, 102. *Lowdon v. Hierons*. In that case toll was claim-

ed in *Covent Garden* market by the lessee of the Duke of *Bedford*, under a grant from Car. 2. which did not give any specific toll, and although by 53 G. 3. c. 71. s. 5., for the regulation of the market, it was enacted that the owner of the market might take of any person who should place, &c. fruits, &c. such tolls "as were usually taken within the market, or which were payable for or in respect of the same:" yet the court of C. B. held that no toll could be taken unless a new grant from the crown could be presumed, and sent the case back to a jury to try that question. However, in 3 B. & A. 366., *The Duke of Bedford v. Emmet*, the court of K. B. held, that as the words of the stat. 53 Geo. 3. c. 71., recognized that tolls should be taken, the only question was, what tolls were usually taken at the time of the passing that act; and that different tolls might be taken for the same articles in different parts of the market. The grantee of a market may remove it to any place within the precinct of his grant. 3 East, 538. *Curwen v. Salkeld*. 1 B. & A. 67. *The King v. Cotterill*. 3 Mod. 108. *Dixon v. Robinson*.

swer, &c. before our lord the king at *Westminster* come as well the said Sir *John Coryton* and *Richard Harvey* by their attorney, as the said *John Lithebye* by *Henry Langford* his attorney, and the said *John Lithebye* defends the wrong and injury when &c. and prays judgment of the declaration aforesaid, because he says that the declaration aforesaid, and the matter in the same contained, are not sufficient in law to have the action of the said Sir *John Coryton*, and *Richard Harvey* maintained against the said *John Lithebye*, to which he the said *John Lithebye* has no necessity, nor is he bound by the law of the land in any manner to answer. And this he is ready to verify; wherefore for want of a sufficient declaration, in this behalf, the said *John Lithebye* prays judgment of the declaration aforesaid, and that the declaration may be quashed, &c.

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Willes's Rep.
479. Bullithorpe
v. Turner.

And the said Sir *John Coryton* and *Richard Harvey* say that, by any thing before alleged, the said declaration of the said Sir *John Coryton* and *Richard Harvey* ought not to be quashed, because they say that the declaration aforesaid, and the matter in the same contained, are good and sufficient in law to maintain the said action of the said sir *John Coryton* and *Richard* against the said *John Lithebye*, which said declaration, and the matter in the same contained, they the said Sir *John Coryton* and *Richard Harvey* are ready to verify and prove as the court, &c.; and because the said *John Lithebye* does not answer to the said declaration, nor has hitherto in any manner denied the same, they the said Sir *John* and *Richard Harvey* pray judgment and their damages on occasion of the premises to be adjudged to them, &c. And because the court of our said lord the king here is not yet advised what judgment to give of and upon the premises, a day therefore is given to the parties aforesaid before our said lord the king at *Westminster*; until day next after to hear their judgment of and upon the premises, because the court of our said lord the king now here is not yet advised thereof, &c.

Joinder in demurrer.

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Curia advisare
vult.

Coryton versus Lithebye.

Case 20.

Pasch. 22 Car. II. Regis. Rot. 331.

ACTION upon the case by *Coryton* and *Harvey* against *Lithebye*; the plaintiffs declare that one *William Findge*, on the 20th of *July* in the 9th year of the reign of the lord

S. C. 2 Lev. 27.
1 Vent. 167.
If two persons
have an entire

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joint damage,
they may bring
a joint action,
though their in-
terests are seve-
ral. 2 Vin. 55.
pl. 46.

Charles the First, was seized of, and in, two water corn-mills under one roof called *Castor* mills, within the manor of *Calliland* in the county of *Cornwall*, in his demesne as of fee; and the said plaintiff *Coryton*, on the 20th of *April* in the year of our lord 1651, and continually afterwards hitherto hath been and yet is, seised of two other water corn-mills under one roof, called *Frogwell* mills, within the said manor, in his demesne as of fee; and that as well the said plaintiff *Coryton*, as the said *Findge*, and all those whose estates they respectively had in the said mills, have from the whole time whereof the memory of man is not to the contrary, separately and respectively from time to time sufficiently repaired, and amended the said mills at their own proper costs and charges, and kept them in repair for the grinding of the barley and wheat of all the tenants inhabiting within the manor aforesaid, used and spent in their several houses within the said manor; and also for the whole time aforesaid have kept and maintained millers to grind such barley and wheat; and in consideration thereof, they the said Sir *John Coryton* and *William Findge*, and all those whose estate they respectively had of and in the several mills aforesaid, for the whole time whereof the memory of man is not to the contrary, have ground, and been accustomed to grind at the said mills or one of them, all the wheat and barley of all the tenants of the said manor of *Calliland* inhabiting within the said manor, by them used and spent in their several houses within the said manor, and have had and taken, for the grinding of every bushel of such wheat and barley so ground, one gallon from and out of every bushel of the said wheat and barley, and so in proportion for a greater or less quantity, for toll for the grinding thereof; and that the said *Findge* being so seised of the said mills called *Castor* mills, on the 20th day of *July* in the said 9th year of the reign of the lord *Charles* the First, demised them to the said plaintiff *Harvey* for a term of years, (and shews the certainty of it), by virtue whereof he entered, and was and still is possessed; and that the said defendant on the said 20th day of *April*, 1651, and always afterwards, was, and yet is, a tenant of the said manor, and possessed of a dwelling-house within the said manor, in which the defendant for all the said time has dwelt; yet the defendant, well knowing the premises, but contriving and fraudulently intending to deprive the said plaintiffs of the profits, which would have accrued to the said plaintiffs for grinding the wheat and barley of the said de-

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fendant used and spent in his house, the said defendant did not grind at the mills of the said plaintiffs, or either of them, 100 bushels of wheat, and 100 bushels of barley, of the corn spent in the house of the said defendant between the 20th day of *December*, in the 20th year of the reign of the now king, and the day of exhibiting the said bill, but for the whole time aforesaid did grind the said corn at some other mills, whereby the said plaintiffs entirely lost the toll of the said corn to their damage, &c., upon which declaration it was demurred in law.

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And the principal cause of demurrer was, because both the plaintiffs had joined in one action, where it appears that their interests are *several*; and *Kelynge* chief-justice in his lifetime, on the first opening of the case, seemed to be of that opinion. And now in this term it was moved again: and *Hale* chief-justice, and all the court was of opinion, that they might well join in the action, for though their interests are several, yet the not grinding at any of their mills is an entire joint damage to both the plaintiffs, for which they shall have their joint action; for otherwise the damages will be twice recovered if they bring several actions. (2)

(2) This case is cited and approved of upon this point in 2 Wils. 423. *Weller v. Baker*; and on the authority of it the court of common pleas held, that several persons, called *dippers* at *Tunbridge wells*, might join in an action against a person, who exercised the business of a dipper, not being duly appointed, and disturbed the plaintiffs therein. That case was, that of these dippers there were only 12 in number, all women, who were chosen by the freeholders of the manor within which the wells lay, and approved of by the lord of the manor; and that the business of a dipper was to attend the wells, and deliver the water to the company who resorted there, and the employment was attended with profits which arose merely from the voluntary contributions of the company; and the defendant having acted as a dipper without a proper appointment, the dippers joined in an action against her for the disturbance, which was thought by the

court to be well brought, because although the dippers were *severally* entitled to receive for their own several use such voluntary gratuities as the company were pleased to give them respectively, yet with regard to a stranger's disturbing them in their *employment*, they were all *jointly* concerned in point of interest; and that it was a hurt done to them all. See 1 Saund. 153. *Eccleston v. Clipsham*. Ibid. 291 b. note (4). *Cabell v. Vaughan*.

With respect to those who may join, or be joined in the same action, it is to be observed, that, regularly where two or more are jointly entitled, or have a joint interest, they may join in the same action; as where two joint owners of a sum of money, travelling together on the highway, were robbed of the money, and thereupon they brought a joint action against the hundred; and on an objection being taken to the action because it was brought jointly by them, whereas each of them ought

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And the court also held the prescription good in the manner it was laid, and that pleading it by the word, "*respectively*," was good enough to avoid prolixity; for otherwise the prescription to repair the mills will be laid twice over.

to have had a separate action, the court held that they might join well enough in this case, because they were jointly entitled to the damages to be recovered against the hundred, though it would have been otherwise, if the sum had been the several property of the parties robbed. Dy. 370. a. pl. 59. So in 2 Leon. 12. pl. 19. it appears, that three men were robbed on the highway, and they three joined in an action against the inhabitants of the hundred, and no objection was taken to the action upon that account. But this, it seems, must be understood of three persons who were robbed of property which they were jointly entitled to. So where A. and B. brought an action of *assumpsit*; and declared that their several cattle had been distrained, and that the defendant, in consideration of 10*l.* paid him by the plaintiffs, promised to procure the cattle to be re-delivered unto them by such a time, and that he had not done so; after verdict for the plaintiffs, it was objected in arrest of judgment, that the plaintiffs ought to have brought *several* actions, in regard the promise was not an entire, but a several, promise made to each of the plaintiffs; but it was adjudged by *Rolle* chief justice and two other judges, against one, that the action was well brought jointly by A. and B., for though the cattle which belonged to A. ought to be restored to him, and the other cattle to be restored to B., and so the thing to be performed was several and not joint, yet inasmuch as the *contract* and *consideration* were joint, and it is not known how much one gave and how much the other, the action was well brought jointly. 1 Roll. Abr. 31. pl. 9.

S. C. Sty. 156, 157. 203. *Vaux v. Steward*, and *Vaux v. Draper*. So where two persons brought an action for a false return to a *mandamus*, and declared of a custom in the parish of C. for the parishioners in *Easter* week to elect two persons to be church-wardens for the year ensuing, and that the plaintiffs had been elected according to the custom, but the defendant, surrogate of the bishop, refused to admit them, whereupon they brought a *mandamus*, to which he falsely and maliciously returned a custom for the vicar to choose one church-warden, wherefore he could not admit both the parties, but was ready to admit one of them, by means whereof they could not undertake their said offices; and after a verdict for the plaintiffs, it was moved in arrest of judgment, that the plaintiffs ought not to join in the action, for the wrong or damage to one is not a wrong or damage to the other, and the office of one is not the office of the other; and they concluded that by reason thereof they could not undertake their said offices; but after several arguments, judgment was given for the plaintiffs by the whole court; for the *mandamus*, and the whole prosecution and charge thereof were joint; and it is not an office of profit, nor was the action brought for that, but for the unjust return, by which they were put to the charge of the *mandamus*. 3 Lev. 362. *Ward v. Brampton*. So where the registrar of a bishop refused to register a licence of a chapel for a conventicle, according to the statute 1 W. & M. c. 18. s. 19., and upon a *mandamus* to him to register it sued out by four or five of the inhabitants, he made

But then *Hale* took an exception, that the prescription was not well alleged, that the defendant ought to grind all the wheat, &c. “*at the said mills, or one of them, which may be,* though one mill only be an ancient mill, and the other not ;

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a false return; upon which the inhabitants, who sued out the *mandamus*, brought an action against him for the false return; upon demurrer it was holden by the court, that they might all well join in the action against him for the false return. 3 Lev. 363. So two or more tenants in common, or jointenants, must join in a *quare impedit* of an advowson, for it is an entire thing, and one of them cannot have a *quare impedit* of a moiety, or of a third or fourth part of an advowson of a church, but they must join; and therefore they ought to agree in a presentation, though it is otherwise of coparceners, for if they do not agree, the eldest shall have the presentation. Bro. Joinder in Action, 103. But where A. and B. were the grantees of the next avoidance of a church, and before any avoidance A. released his interest to B. and then the church became void, it was holden that B. alone should present to the church, and if he be disturbed, might bring a *quare impedit* in his own name only. Cro. Eliz. 600. *Bennet v. Bishop of Norwich*. So in an action on the case for arresting and stopping a ship by process out of the admiralty court prosecuted by the defendant, it was adjudged that *all* the proprietors of the goods ought to join: but where only one brought the action and had judgment, the joint proprietorship not being pleaded in abatement, the judgment was affirmed in error; for though it appeared by the declaration that there were four other jointenants of these goods with the plaintiff, yet it did not appear but they were dead, and then the plaintiff alone was entitled to the

action; and wherever jointenancy is pleaded in abatement, the life of the other jointenant, not named, is averred in the plea, otherwise it is ill, according to 1 Saund. 291. *Cabell v. Vaughan*. 1 Salk. 31. *Child v. Sands*. S. C. 3 Lev. 351. 4 Mod. 176. 181. *Skin*. 334. 361. 6 Term Rep. 766. *Addison v. Overend*.

But if a man says to two persons, “you have murdered J. S.” or imputes to them any other crime, they cannot join in one action against him for speaking these words, but each of them must bring a separate action, for the wrong done to one is no wrong done to the other. Cro. Car. 513. *Smith v. Cooker*. So two persons cannot join in an action of false imprisonment, or assault and battery; for the imprisonment and battery done to one cannot be the same as that done to another. Owen, 106. Bro. Joinder in Action, 68. *Fitz. Joinder in Action*, 17. But two or more partners may join in an action of slander for words spoken of them in the way of their trade, whereby they have sustained special damage. As where two persons, woolstaplers and copartners, who had bought a quantity of wool to be weighed by themselves, and paid for according to weight, brought an action against another for saying of them in the way of their trade, that when the wool was weighed by the plaintiffs there was a pound weight concealed under the brass weight, stating special damage by reason of speaking the words; it was held, on a general demurrer, that they might well join in the action, because the damages were joint and entire to plaintiffs as copartners who were jointly interested, and a multipli-

CORYTON v. LITHEBYE. for in that case it is true that they ought to grind "at the said mills, or one of them;" and therefore he said that it ought to have been laid, that they ought to grind at the said mills, or one of them, that is to say, all the multure which is not ground

city of actions would be created, if the contrary doctrine were to be maintained. 3 Bos. & Pull. 150. *Cooke v. Batchelor*. See the form of such an action in Brownl. Rediv. 81. Though there was special damage laid in the declaration in this case, yet if words are actionable only because they were spoken of persons in the way of their trade, I conceive that two or more partners may join in an action for the words, though they had sustained no special damage thereby. It should seem that two joint-tenants, or coparceners may join in an action of slander of *their title* to the estate; for as it must be shewn in the declaration and proved, that the plaintiffs received some particular damage by reason of the slander, the *damage* even, as well as their interest in the estate, is joint. But where a father and son covenanted with a purchaser to sell lands, &c. and, "*item*, it was "agreed between the parties," that the purchaser should pay so much of the purchase money to the son, and an action for such money was brought in the *name of both*; upon a demurrer to the declaration it was held ill, because the duty was vested in the son, and he alone ought to have brought the action; and judgment was given for the defendant. 3 Mod. 263. *Tippet v. Hawkey*. But a surviving partner and the executor of a deceased one cannot join, for though the duty does not survive, the remedy does.

Salk. 444. *Martin v. Crump*. S. C. Ld. Raym. 340. [d]

So with respect to actions brought against two; if two men falsely and maliciously procure another to be indicted for a common barrator, he may have an action upon the case in the nature of a conspiracy *against both*; though in strictness the procurement of one is not the procurement of the other; so in the case of maintenance and trespass, and yet the maintenance or trespass of the one is not the maintenance or trespass of the other. Latch. 262. *Pencavin v. Trapping*. So a joint action of debt may be brought against several persons to recover one penalty upon the game laws; as for instance to recover the penalty of 5*l.* under the statute 5 Ann. c. 14. s. 4. for keeping a lurcher to kill and destroy the game. 2 East, 573. n. (a), *Handyman v. Whitaker*. So a joint action of debt may be brought against several defendants upon the statute 2 & 3 Edw. 6. c. 13. for not setting out their tithes. Carth. 361. *Bastard v. Hancock*. And in both these actions the jury may find a verdict against some of the defendants, and acquit the rest. For these actions are not to be considered as founded on a contract, but on a *tort*, which is joint and several, and in which some may be found guilty, and the others acquitted. Bro. Responder, 63. and, *not guilty*, may be pleaded thereto. For if they were

[d] So much so, that a debt due to a defendant as surviving partner may be set off by him against a debt due from him in his own right; 5 T. R. 493. *Slipper v. Sidstone*; and a debt due to

a defendant from the plaintiff as surviving partner, may be set off against a debt due from the defendant to the plaintiff in his own right. 6 T. R. 582. *French v. Andrade*.

at the plaintiff *Coryton's* mills, at the mills of the plaintiff *Harvey*, and all the multure which is not ground at the plaintiff *Harvey's* mills, at the mills of the plaintiff *Coryton*. And *Twysden* justice took another exception, that the prescription

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founded on a contract the defendants would be answerable jointly or not at all; and the jury could not find a verdict against one of the defendants and acquit the others, because the verdict of acquittal of some would negative the joint contract.

But a man cannot bring a joint action against two and declare against one of them for an *assault and battery*, and against the other for *taking away his goods*, because the trespasses are of several natures, and against several persons, and they cannot plead to this declaration. Sty. 153, 154. *Cutsworth's* case. [e] So one action will not lie against several persons for speaking the same words; as where a man brought an action against two for saying, "thou hast stolen plate from *Cambridge* of J. S. " and we do arrest thee of that felony;" and there being a verdict for the plaintiff, it was moved in arrest of judgment, that the action does not lie against two jointly, because the words of one are not the words of the other, but there ought to have been several actions, in like manner as two persons cannot bring a joint action for words, and so it was resolved by the court, for these several causes can no more produce a joint action, than their words and tongues may be said to be one. Palm. 313. *Chamberlaine v. Willmore*. S. C. Cro. Jac. 647. 1 Buls. 15. *Stroud v. Roper*. But where in an action against husband and

wife for that they spoke of the plaintiff certain scandalous words, the jury found the husband guilty, and the wife not guilty, the plaintiff shall have judgment; for though the action ought not to have been brought against both, and therefore if the defendant had demurred to the declaration it would have been bad, yet the verdict hath cured this error. 1 Roll. Abr. 781. (O) pl. 1. Sty. 349. *Burcher v. Orchard*. S. C.

This naturally leads me to consider what causes may be joined in the same declaration. It is said, that the true test to try whether two counts can be joined in the same declaration is to consider whether there be the same judgment in both, and not whether they both require the same plea, and where ever there is the same judgment in both, they may well be joined. 2 Wils. 921. *Dickon v. Clifton*. But in a subsequent case it was thought, that this rule or test, as laid down in *Dickon v. Clifton*, is rather too large, and not universally true, though it may be one good rule or test, among others, to try this point by. 3 Wils. 354. *Mast v. Goodson*. It has been adjudged, that debt on an obligation, and on a *mutuatus*, may be joined in the same action, though the former is a contract under seal, and the other only a simple contract, and the plea to the one is *non est factum*, and to the other *nil debet*, but the judgment is

[e] Neither can the plaintiff in an action of trover recover against several defendants for several conversions of the same goods; in order to fix all the defendants, he must prove a joint conversion by all, and if the evidence shows

separate conversions he must take his verdict against those defendants only who were parties to some one conversion, and all the other defendants must be found not guilty. 1 M. & S. 588. *Nicoll v. Glennie*. Ante, 47 i. note [f].

CORYTON v. LITHEBYE. was laid too generally: for it is, that the plaintiffs ought to grind all the multure and corn which is spent in the defendant's house, and therefore the defendant cannot spend any corn in his house unless it be first ground; and so he cannot

the same in both. 1 Vent. 366. *Denison v. Ralphson*. Cro. Car. 316. *Parker v. Taylor*. So debt and detinue may be joined in the same action, for they are of the same nature; though in 5 Mod. 89. *Dalston v. Janson*, it said by the court, that it seems strange that debt and detinue should be joined, because these actions have different judgments. But debt and trespass, or debt and account cannot be joined, for they are of different natures. Bro. Joinder in Action. 97. So debt for rent upon a lease, either by parol or indenture, and for goods sold and delivered, may be joined in the same action. Bro. Joinder in Action, 90. Gilb. H. C. P. 5. 4 Bac. Abr. 11. So several trespasses committed on several days and in several places, though separate wrongs, and several causes of action, may be joined in the same action. 8 Rep. 170 b. *Buckmere's case*. So an action against a common carrier upon the custom of the realm, or for a misfeasance, and trover may be joined. 4 Bac. Abr. 11. 2 Wils. 319. *Dickon v. Clifton*. 1 Vent. 223. *Owen v. Lewyn*, 365. *Denison v. Ralphson*. 1 Term. Rep. 277. *Brown v. Dixon*. So an action on the case for immoderately riding a horse and trover may be joined. 1 Lutw. 98—101. *Cowper v. Towers*. Cro. Car. 20. *Whyte v. Rysden*. So an action on the case for disturbing the plaintiff in his right of common, and of cutting and taking rushes upon the common for litter for his cattle, and trover may be joined. 3 Wils. 456. *Beau v. Bloom*. But detinue and trover cannot be joined. Willes's Rep. 118. *Kettle v. Bromsall*. So debt upon a bond and upon a judgment may be joined in the same action. 1 Lutw. 43. *Wentworth v. Squib*. So

in 1 Wils. 248. *Duke of Bedford v. Alcock*, it was holden that debt for an amercement in a court leet, and a *mutuatus* may be joined, and it was said in that case, that the true way to judge of this matter is this, that wherever the same *process* and *judgment* are in two counts, they may be joined, otherwise they cannot; and for this reason it is, that debt on a judgment and a *mutuatus*, or debt on a bond and a *mutuatus* may be joined, although different pleas be required; see the form of a declaration in debt upon an amercement and a *mutuatus*. 2 Brown Ent. 83, 84. 2 Salk. 772. *Brook v. Hustler*. So an action on the case against the defendant for wrongfully and injuriously obstructing and hindering the plaintiff from landing his goods upon a yard of the defendant, contrary to a written agreement between them, and trover may be joined. 3 Wils. 348—354. *Mast v. Goodson*. So an action on the case for not returning to the plaintiff a spaniel delivered by him to the defendant to be viewed and returned in a reasonable time, but keeping and detaining the spaniel from the plaintiff, may be joined with a count in *trover*. 1 Term. Rep. 274. *Brown v. Dixon*; and it is there said, "that perhaps the rule of judging whether two counts can be joined, by considering whether the same judgment can be given on both, is not true in its extent; but by adding another requisite it is universally true. For wherever the same *plea* may be pleaded, and the same *judgment* given on two counts, they may be joined in the same declaration." It appears however by the before cited cases, where it is held that debt on bond and on a

feed any poultry, or give any to his cattle, or make firmity with it, (as he said) unless it be ground, and therefore he said it was unreasonable. (3) And for these two exceptions, judgment, at the prayer of *Saunders* of counsel for the plaintiffs,

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mutuatus, and debt on bond and on a judgment, may be joined, which unquestionably is good law, that by the last-mentioned rule it is not meant that no counts can be joined *unless* as well the same plead may be pleaded, as the same judgment given on them; but that the meaning of the rule is, that it is universally true as far as it extends: and so it certainly is, and may be adopted with great advantage wherever it applies.[c]

But actions founded upon a *tort* and upon a *contract* cannot be joined in the same declaration; as *assumpsit* and action upon the case for a *tort*. 1 Term. Rep. 276. *Brown v. Dixon*. 1 Vent. 366. *Denison v. Ralphson*. So *assumpsit* and *trover* cannot be joined, and though there is a verdict for the defendant on the count for the *trover*, yet it is said, that does not cure the declaration, but it is bad *ab initio*. 2 Lev. 101. *Holms v. Taylor*. 3 Lev. 99. *Bage v. Bromuel*. 1 Salk. 10. *Dalston v. Janson*. 3 Wils. 354. *Mast v. Goodson*. [d] So *assumpsit*, and an action upon the case founded upon *fraud*, or *deceit*, cannot be joined. Carth. 189. *Willett v. Tydy*. So a count by the plaintiff as executor on a contract made with his testator, and a count in

his own right cannot be joined; as where H. brought an action as administrator to A., and declared on an *indebitatus assumpsit* to A., and an *insimul computasset* between plaintiff and defendant for money due to the plaintiff himself. Hob. 88. *Herrenden v. Palmer*. 1 Salk. 10. *Rogers v. Cooke*. 3 Term Rep. 659, 660. *Petrie v. Hannay*. 2 Saund. 210 a. note. It has been said, that a count for money had and received by the defendant to the use of the executor as such, may be joined to a count for money had and received to the use of the testator. 3 Term Rep. 659, 660. But this seems questionable; for money received to the use of an executor after the death of the testator, gives a different cause of action to the executor from that which accrued to the testator by the receipt of the money in his life time. In the latter case, the executor must necessarily sue as such, and is not liable to costs if he fails in the action; but in the former case he need not sue as executor, but may bring the action in his own name; and if he does sue as executor, he is liable to costs as any other person is. 1 Ld. Raym. 437. *Nicolas v. Killigrew*. 2 Ld. Raym. 1215. *Wallis v. Lewis*. 2 Term. Rep.

[c] But even with these limitations the rule is not unexceptionable; for it is clear that *case* and *trespass* cannot in general be joined, although the same plea of not guilty of the premises will serve for both, and there is the same judgment in each for damages and costs: and though in general the judgment in *trespass* is *quod capiatur*, and in actions in case *quod sit in misericordia*, yet

sometimes there is an entry of a *capiatur* in case as well as in *trespass*. Tidd's Pract. 11. See post, 117 c.

[d] But this doctrine as to the misjoinder not being cured by verdict is wholly overruled in 2 M. & S. 533. *Kightly v. Birch*, where Lord Ellenborough C. J. observed that the case of *Bage v. Bromuel* had had its day, and that it was time it should cease.

B b

CORYTON v. was given for the defendant, because he intended to bring a **LITHEBYE.** new action and amend those faults.

It is not necessary to state that the mills were ancient mills.

Note; —an exception was taken that it was not averred that the mills were ancient mills, but the court thought it was good enough without such an averment. .

477. *Smith v. Barrow*. It seems to be as much a *new contract* as if a *promissory note*, or a *bond*, had been given to him as *executor*, in which case it is held that the executor cannot join a count on such note or bond made to him as *executor* to a count on a promise made, or a debt due to the *testator*. 10 Mod. 316. *Betts v. Mitchell*. 3 Bos. & Pull. 7. *Hosier v. Lord Arundel*. For the same reason it should seem, that an executor cannot join an *insimul computasset* for money due from the defendant to him as *executor*, to a count on a promise made to the testator; the executor on such a count being liable to costs. 1 Ld. Raym. 437.; for the old notion that the money recovered will be assets, and therefore the executor is not subject to costs, which was the ground of the decision in Sir T. Jones, 47. *Bull v. Palmer*. 2 Lev. 165. S. C. seems to be now exploded. 7 Term. Rep. 358, 359. *Bollard v. Spencer*; but perhaps an *insimul computasset* with the plaintiff as executor for money due to the testator, may be joined to a count on a promise made to the testator; for the accounting with the executor does not give a new duty, but only ascertains that which was due before,

and therefore the duty to the testator is not altered thereby. See also ante, 47 k.

Since the former part of this note was written, the subject of joining counts by an executor has been much considered; and it is now held that if the money recovered on each of the counts will be *assets* according to the rule in the before-mentioned case of *Bull v. Palmer*, the counts may be joined in the same declaration. And therefore in the case of *Ord v. Fenwick*, 3 East, 104., it was held that a count in *assumpsit* to the plaintiff as *executrix* for money paid by her to the defendant's use, may be joined with another count on promises made to the testator. And so is the case of *Foxwist v. Tremaine*, post, 207. And in *Cowell v. Watts*, 6 East, 405., the court held that a count, upon a promise to the plaintiff as *administratrix* for goods sold and delivered by her after the death of the intestate, may be joined with a count upon an account stated with her as *administratrix*, assigning as a reason that whenever the money when recovered would be *assets* the counts may be joined.[e] But it must be stated in the count that the duty accrued to the

[e] So in 1 T. R. 487. *King v. Thom*, it was held that the plaintiffs might sue as executors upon a bill of exchange indorsed to them as *executors* for a debt due to their testators, for the sum recovered would be assets. For the same reason, in 5 Price, 412. *Partridge v. Court*, it was held that an administrator might join counts on promises to the intestate, with a count on a promissory

note indorsed to him as administrator; which judgment was affirmed on error. 7 Price, 591. *Court v. Partidge*. And in case of the death of such administrator, an action on the note will lie at the suit of the administrator *de bonis non*, even although the note were indorsed to the first administrator in blank; provided it were indorsed to him for a debt due to his intestate; for

plaintiff in his representative capacity of executor. It is not enough to say that it accrued to him executor, or being executor; it must be averred that it accrued to him *as executor*. And therefore where a count, upon an account stated with the plaintiff *executrix*, (not saying *as executrix*,) was joined with a count on a promise to the testator, it was held in error after judgment by *nil dicit* and a writ of inquiry and final judgment that those two counts could not be joined. 5 East, 150. *Henshall v. Roberts*.

So a plaintiff shall not have an action *against* another, to charge him as executor, and also in his own right; for the judgment in the one case is *de bonis testatoris*, and in the other *de bonis propriis*. Hob. 88. *Herrenden v. Palmer*. 2 Lev. 228. *Hall v. Huffam*. Therefore a count for money had and received by the defendant *as executor* for the plaintiff's use, or for money lent him *as such*, or on an *insimul computasset* of money due from him *as such*, cannot be joined to a count on a promise made by the testator. [f] And

such misjoinder of action either by or against an executor, is a defect in substance, and therefore bad on a general demurrer, or in arrest of judgment, or on error. 4 Term. Rep. 347. *Jennings v. Newman*. 1 H. Black. 108. *Rose v. Bowler*. 2 Bos. & Pull. 424. *Brigden v. Parkes*. See the reason thereof *postea*, 210. 210 a. in the note. But a count on an account stated with an executor *for money due from the testator*, may be joined to a count on a promise made by the testator. 1 H. Black. 102. *Secar v. Atkinson* [g]; this being the common mode of declaring against executors, to save the statute of limitations. So a man cannot join *trespass*, and *trespass on the case* in the same action, for they are two distinct things and of different natures, and the judgments are different; for in trespass the judgment is *quod capiatur*, and in trespass on the case, *quod sit in misericordia*. 1 Ld. Raym. 273, 274. *Courtney v. Collet*. [h] The result of all these cases seems to be, that wherever the same plea may be pleaded, and the same judgment given in all the counts of the declara-

the blank indorsement may be filled up by the administrator *de bonis non*. *Catherwood v. Chabaud*, 1 Barn. & Cress. 150. The rule that counts may be joined, whereon the sum recovered on them would be assets, is fully confirmed in 1 Taunt. 322. *Thomson v. Stent*. 6 Taunt. 453. *Powley v. Newton*. 2 Marsh, 147. S. C. Upon a similar principle it has been held that a count by the assignee of a bankrupt for money lent by him as assignee is good, and may be joined with a count for money had and received to his use as assignee. 5 M. & S. 294. *Richardson v. Griffin*.

[f] But in *Powell v. Graham*, 7 Taunt. 580. 1 B. Moore, 305. S. C., it was held that a count on an *insimul computasset* of money due from the defendant

as executor, may be joined with counts on promises by the testator; for that on such a count the judgment will be only *de bonis testatoris*.

[g] Forrest. 98. *Ellis v. Bowen*, S. P.

[h] See ante, 117 c. note [c]. But trespass *quare clausum fregit*, and trespass *per quod consortium*, or *servitium amisit*, may be joined; although the latter action being for a consequential injury, seems more in the nature of case than trespass. 2 N. R. 476. *Woodward v. Walton*. 2 M. & S. 436. *Ditcham v. Bond*. Notwithstanding the cases cited in 6 East, 387. *Macfadren v. Olivant*. See Tidd's Pract. 5. where this matter is discussed by the learned author.

tion; or whenever the counts are of *the same nature*, and the same judgment is given on them all, though the pleas be different, as in the case of debt upon bond and on a *mutuus* already mentioned, they may well be joined.

(3) The same objection was taken in Hob. 189. *Harbin v. Green*. Moor, 887. S. C. [and recognized in Willes's Rep. 657. *Drake v. Wiglesworth*,] where a custom for the inhabitants to grind *all their grain whatsoever* by them spent or sold in their said messuages at the plaintiff's mills, and not elsewhere, was held to be void: for by that custom, if a man bought corn he could not sell it again in corn in his house, for he must first grind it at these mills; and the

breach was assigned as well in corn sold as spent; and Lord *Hobart* was of opinion, that if the plaintiff had assigned it only in corn *spent*, it would not have served. See Doug. 221. *Cort v. Berbeck*. The pleading in this case should have been, "all the corn and grain *after the grinding thereof*, or ground, and *spent*, &c." But it is a good custom that all the householders and occupiers of dwelling-houses in the parish of A., shall grind at the plaintiff's mill all their corn which shall be used by them ground within the parish, although the inhabitants are not tenants. 1 Roll. Abr. 559. pl. 4. *Higges v. Gardener*. Willes's Rep. 654. *Drake v. Wiglesworth*.

Case 21.

Chandler *versus* Vilett.

Hil. 21 & 22 Car. II. Regis. Rot. 1297.

WILTSHIRE, to wit; Be it remembered that heretofore, to wit, in the term of *St. Michael* last past, before our lord the king at *Westminster* came *Thomas Chandler*, who is within the age of twenty-one years, by *John Ridley* his guardian specially admitted by the court here, and brought here into the court of our said lord the king then there his certain bill against *Richard Vilett* gent. in the custody of the marshal, &c. of a plea of trespass upon the case, which said bill follows in these words, to wit: *Wiltshire*, to wit, *Thomas Chandler*, who is within the age of twenty-one years, by *John Ridley* his guardian specially admitted by the court here (1), com-

(1) If an infant sues or defends by his guardian, the guardian must have a warrant, though if he sues by his *prochein amy* or next friend, the *prochein amy* need not; but both the guardian and *prochein amy* must be admitted by the court. F. N. B. 63. I. 7th edit. 2 Inst. 261. 3 Mod. 236. *Fitzgerald v. Villiers*. Cro. Car. 86. *Young v. Young*.

See the form of the rule or order for the admission. Tidd's Pract. Forms, 6, 7, 8. 2 Sell. Prac. 66, 67. Imp. C. P. 625—628. 4th edit. And if the infant sues by guardian or *prochein amy*, without saying in the declaration "by the court here specially admitted," it is error. 1 Lev. 224. *Combers v. Watton*. But the insertion of those words in the

plaints of *Richard Vilett* gent. being in the custody of the marshal of the marshalsea of our lord the king before the king himself, for that whereas the said *Richard*, on the 1st day of *May* in the 17th year of the reign of our lord *Charles* the second now king of *England*, &c. at *Highworth* in the said county, was indebted to the said *Thomas* in 50*l.* of good and lawful money of *England*, for money by the said *Richard* before that time had and received to the use of the said *Thomas*, and being so indebted, he the said *Richard* in consideration thereof undertook, and then and there faithfully promised the said *Thomas*, that he the said *Richard* would well and faithfully pay and satisfy the said 50*l.* to the said

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Indebitatus assumpsit, for money had and received.

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declaration is holden to be sufficient, though there be no admission of the guardian, or *prochein amy*, on the roll. 4 Rep. 53 b. 54 a. *Rawlyn's* case. 1 Sid. 173. *Swift v. Nott*; for it is no error, but only a misdemenor in the agent who is employed in the cause. If however in fact there be an admission of the *prochein amy* or guardian by the court, but it is not entered of record, the court will give leave to enter it. Cro. Car. 86. *Young v. Young*. S. C. Hutt. 92. 1 Lev. 224. *Combers v. Watton*. If an infant sues by guardian or *prochein amy*, he cannot afterwards remove his guardian, or disavow the action of his *prochein amy*. F. N. B. 63. K. 7th edit.; but an infant may either have a writ out of the court of chancery to remove him, or, which is the usual course, may apply to the court, who may remove him at their discretion. Ibid. Cro. Car. 161. *Goodwin v. Moore*. Though the names of guardian and *prochein amy* are often used indiscriminately, and an infant may sue either by one or the other, yet in practice an infant plaintiff generally sues by his *prochein amy*, but an infant defendant must in all cases appear and defend by his guardian. Co. Litt. 135. b.

2 Inst. 261. 2 Str. 784. *Frescobaldi v. Kinaston*.

The rule or order for the admission of a *prochein amy* should be obtained before declaration, and a copy thereof annexed to it, otherwise the defendant is not compellable to plead. Sty. Pr. Reg. 284. And the attorney for the plaintiff, if required, must give notice to the defendant's attorney, of the place of abode of the *prochein amy*. 1 Wils. 246. *Tomlin v. Brookes*. In like manner the rule or order for the admission of a guardian, should be obtained before plea, and a copy of it annexed thereto; for if an infant defendant appear by attorney, though it be in consequence of common process with a notice requiring him to appear in that manner, the plaintiff may obtain an order for striking out the appearance, and that the defendant may appear by guardian within a certain time, or in default thereof, that the plaintiff may be at liberty to name a guardian to appear and defend for him. Barnes, 413. *Kerry v. Cade*. 418. *Gladman v. Bateman*. And a similar order may be obtained where the defendant neglects to appear at all. 2 Str. 1076. *Stone v. Atwell*, 2 Wils. 50. *Shipman v. Stevens*. [a]

[a] See post, 212. notes.

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2d count, also
for money had
and received.

Breach.

Thomas. And whereas also the said *Richard*, afterwards to wit, on the said 1st day of *May* in the 17th year aforesaid, at *Highworth* aforesaid in the county aforesaid, was indebted to the said *Thomas* in 12*l.* of like lawful money, for other money by the said *Richard* before that time likewise had and received to the use of the said *Thomas*, and being so indebted he the said *Richard* in consideration thereof undertook, and then and there faithfully promised the said *Thomas*, that he the said *Richard* would well and faithfully pay and satisfy the said 12*l.* to the said *Thomas*. (2) Yet the said *Richard*, not regarding his said several promises and undertakings, but contriving and fraudulently intending craftily and subtilely to deceive and defraud the said *Thomas* in this behalf, has not paid the several sums, amounting in the whole to 62*l.*, to the said *Thomas*, nor has he in any wise satisfied him for the same (although to do this he the said *Richard* afterwards, to wit, on the 1st day of *August* in the 21st year of the reign of our said lord the now king, at *Highworth* aforesaid in the county aforesaid, was requested by the said *Thomas* (3), but to pay him the same has hitherto altogether refused and still refuses, to the damage of the said *Thomas* of 80*l.*, and therefore he brings suit, &c.

(2) According to the present mode of declaring, these two sums of 50*l.* and 12*l.* would be included in *one count*, stating that the defendant was indebted to the plaintiff in a certain sum of money more than sufficient to comprehend these sums; as in this case, "that the said (defendant) on, &c. at, &c. was indebted to the said (plaintiff) in 100*l.* (for instance) of good and lawful, &c. for so much money by the said (defendant) before that time had and received to the use of the said (plaintiff), and being so indebted, &c."

and the plaintiff upon this count would now recover these two sums of 50*l.* and 12*l.*, if he proved that the defendant had at different times received them for his use. [b]

(3) As this declaration is for a preceding debt, or duty, there is no necessity to lay a time and place of request as is done here, but the general allegation of, "although often requested," is holden to be sufficient; for the bringing of the action is a sufficient request. 1 Saund. 33. *Birks v. Trippet*.

[b] A count, stating that the defendant had and received money to the use of the plaintiff, to be paid to the plaintiff on request, but that not regarding his duty, he converted the money to his own use, is bad on demurrer, as it can-

not be considered as a count in trover, but is an attempt to convert an action of *assumpsit* into an action of *tort*. 5 B. & A. 652. *Orton v. Butler*. 1 Dowl. & Ry. 282. S. C.

And now at this day, to wit, on *Monday* next after the octave of *St. Hilary* in this same term, until which day the said *Richard Vilett* had leave to imparl to the said bill, and then to answer, &c. before our lord the king at *Westminster* comes as well the said *Thomas Chandler* by his guardian aforesaid, as the said *Richard Vilett* by *William Hewes* his attorney, and the said *Richard* defends the wrong and injury, when, &c. and says that the said *Thomas* ought not to have or maintain his said action thereof against him, because he says, that the said *Thomas* on the 23d day of *October* in the 21st year of the reign of our said lord the now king, exhibited his said bill against the said *Richard*, and that he the said *Richard* at any time within six years next before the day of the exhibiting of the said bill did not undertake in manner and form as the said *Thomas* has above thereof complained against him. And this he is ready to verify. Wherefore he prays judgment if the said *Thomas* ought to have or maintain his said action thereof against him, &c.

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Plea.
Imparlanee.

*Non assumptis
infra sex annos.*

And the said *Thomas* says, that he, by any thing by the said *Richard* above in pleading alleged, ought not to be barred from having his said action thereof against him, because he says that he the said *Thomas* at the time of making the several promises and undertakings aforesaid, and also on the day of exhibiting the said bill of the said *Thomas*, to wit, on the said 29d day of *October* in the 21st year aforesaid, was within the age of twenty-one years, to wit, at *Highworth* in the said county. And this he is ready to verify; wherefore he prays judgment and his damages on occasion of the premises to be adjudged to him, &c.

Replication.

Plaintiff, at the time of making the said promises, and of the commencement of this suit, was an infant.

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General demurrer to the replication, and a joinder in demurrer.

But because the court of our lord the king here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid before our lord the king at *Westminster*, until *Friday* on the morrow of the *Ascension*, to hear their judgment of and upon the premises, for that the court of our said lord the king here is not yet advised thereof, &c.

*Curia aduocare
vult.*

At which day, before our lord the king at *Westminster*, come the parties aforesaid by their attornies aforesaid, whereupon all and singular the premises being seen, and by the court of our said lord the king more fully understood, and mature deliberation thereupon had, for that it appears to the

Judgment for
plaintiff.

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Writ of inquiry
awarded.

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The sheriff re-
turns the inqui-
sition :

and final judg-
ment thereon.

court of our said lord the king now here, that the plea aforesaid by him the said *Thomas* in manner and form aforesaid. above in replying pleaded, and the matter in the same contained, are good and sufficient in law for him the said *Thomas* to have his said action thereof maintained against the said *Richard*, it is considered that the said *Thomas Chandler* ought to recover his damages against the said *Richard* on occasion of the said premises : but because it is unknown to the court of our said lord the king now here, what damages the said *Thomas* has sustained on occasion of the said premises, the sheriff is therefore commanded that, by the oath of good and lawful men of his bailiwick, he diligently inquire what damages the said *Thomas* has sustained, as well on occasion of the said premises, as for his costs and charges by him about his suit in this behalf expended, and send the inquisition which he shall take thereon to our lord the king at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, under his seal, and the seals of those by whose oath he shall take that inquisition, together with the writ of our said lord the king to him therefore directed ; the same day is given to the said *Thomas*, there, &c. At which day before our lord the king at *Westminster*, comes the said *Thomas* by his attorney aforesaid, and the sheriff of the county of *Wilts*, to wit, *John Hall*, esq. by virtue of the writ of our said lord the king to him thereof directed, returns a certain inquisition taken before him at *Swindon* in the county aforesaid, on the 2d day of *June* in the 22d year of the reign of our lord *Charles* the second, now king of *England*, &c., by the oath of twelve good, &c. by which it is found that the said *Thomas Chandler* sustained damages on occasion of the said premises, besides his costs and charges by him about his suit in that behalf expended, to 65*l.*, and for those costs and charges to 40*s.* Therefore it is considered that the said *Thomas Chandler* recover against the said *Richard Vilett* the damages aforesaid, by the inquisition aforesaid above in form aforesaid found, and also 5*l.* for his said costs and charges adjudged of increase to the said *Thomas* by the court of our said lord the king now here with his assent ; which said damages in the whole amount to 72*l.* And the said *Richard* in mercy, &c.

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ASSUMPSIT by Chandler an infant by his guardian against Vilett; the plaintiff declares upon two promises that the defendant was indebted to him in 50*l.* and 12*l.* for monies by the said defendant before that time had and received to the use of the plaintiff, and being so indebted the defendant promised to pay those monies and had not paid them, wherefore he brought his action: the defendant pleads in bar *non assumpsit infra sex annos*: to which the plaintiff replies, that at the time of the promises, and also at the time of exhibiting the bill, he was and still is an infant within the age of 21 years: to which the defendant demurs in law.

S. C. 1 Sid. 453. The privileges by reason of infancy and other impediments are saved, in an action on the case on assumpsit, by the statute 21 Jac. 1. c. 16. of limitations, and that action is within the equity of the saving clause thereof, though it is named in the limiting clause only.

And it was objected by G. Strode of Lincoln's Inn, that this action was limited by the statute of limitations of 21 Jac. 1. c. 16. to be brought within six years, and the privilege of infancy is not saved by the statute in this action; for in the restraining and limiting part of the statute *, this action upon the case is limited to six years; and it is not excepted in the saving clause of the act†; for the words are, "Provided nevertheless, and be it further enacted, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accumps, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action given or accrued, fallen or come, within the age of 21 years, feme covert, non compos mentis, imprisoned, or beyond the seas; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to, or being, of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediments should have done." Wherefore no actions on the case are saved and excepted by reason of infancy out of the body of the act, except only actions on the case for words. And all other actions on the case are limited within the body of the act, and are not saved or excepted in the case of infancy by the saving clause; and therefore he concluded that the plaintiff should be barred.

* Sect. 3.

† Sect. 7.

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Sed non allocatur; for by the court, this action on the case is within the equity of the saving clause of the act, though it be not expressed; for the intention of the statute was not to preserve a trivial action on the case for *slandorous words* in respect of infancy, and not to save for the infant an action for a *real duty*, as in this case; wherefore it was adjudged for the plaintiff. (4)

(4) The same point was determined in the Common Pleas in a subsequent case, 2 Mod. 71. *Crosier v. Tomlinson*, where the court said, "that upon the whole frame of the act it was strong against the defendant, for it would be very strange that the plaintiff might bring an action of *debt*, and not of *indebitatus assumpsit*. When the scope of an act appears to be in a general sense, the law looks to the meaning, and it is to be extended to particular cases within the same reason; and therefore they were of opinion, that actions of *trespass* mentioned in the statute are comprehensive of this action, because it is a trespass upon the case; and the words of the proviso save the infant's right in actions of trespass. And though there are particular words in the enacting clause which relate to the action, yet this proviso restrains the severity of that clause, and restores the common law, and so is to be taken favourably; and this action, being within the same reason with other actions therein mentioned, ought also to be within the same remedy." See also Fitzg. 81. So where the defendant pleaded to an action of trover, that the cause of action did not accrue to the plaintiff within six years, and the plaintiff re-

plied that he was beyond sea, and upon a demurrer to the replication it was objected, that the action of trover was omitted out of the statute; for though the first words of the third section of the statute are, that an action of trover (among others mentioned therein) shall be brought within the time hereafter expressed, yet in the enumerating of the actions in the subsequent part of the section limiting them to particular times, the action of trover is omitted; but all the court conceived, that notwithstanding such omission, the action of trover was implied in the general words of "actions upon the case," and therefore they overruled the objection. Cro. Car. 248. *Swayn v. Stephens*. See also 3 Bac. Abr. 519. It was holden by Lord Holt, that *Dublin*, or any other place in *Ireland*, is beyond sea within this statute. 1 Show. 91. *Anon. (c)* If the plaintiff be in *England* at the time the cause of action accrues, the time of limitation begins to run, so that if he, or his personal representative, does not commence an action within six years, they are barred by the statute. 1 Wils. 194. *Smith v. Hill*. So if one plaintiff be abroad, and the others in *England*, the action must be brought within six years after the cause of action arises. 4 Term Rep. 516. *Perry v. Jackson. (d)* By 4 Ann. c. 16. s. 17, 18. it is

[c] But where the plaintiff replied that he was resident in foreign parts out of the kingdom of *England*, viz. at *Glasgow* in *Scotland*, the replication

was holden bad, for he must be beyond the seas. Bl. Rep. 286. *King v. Walker*.

[d] And where a disability is once

Note ; it was said, that the infant should have waited until his full age, because the six years were elapsed during his infancy, and therefore he could only pursue his action according to the words of the saving clause of the act, which is in six years *after his full age* ; but this was not regarded by the court. And it seems to me that he may well pursue his action at any time within age, although the six years are elapsed. See for this the case of non claims in fines, 2 Inst. 519. *Cotton's case*. (5)

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enacted, that all suits and actions in the court of admiralty for seamen's wages shall be commenced within six years next after the cause of such suits or actions shall accrue, and not after, with a proviso in favour of the plaintiff's infancy, coverture, imprisonment, or residence beyond the seas at the time the cause of action accrued.

It seems to have been the better opinion, that the exception in the statute 21 Jac. 1. c. 16., in favour of persons being beyond sea, extends only to the case where the *creditors* or *plaintiffs* were so absent, and not where the *debtors* or *defendants* were, because *creditors* are only mentioned in the statute. 1 Show. 99. *Hall v. Wyborn*. 3 Bac. Abr. 514. But now by the before mentioned statute 4 Ann. c. 16. s. 19. it is enacted, that if any person *against whom* any action lies for seamen's wages, trespass, detinue, trover, replevin, action of account, or upon the case, (or other actions mentioned in

21 Jac. 1. c. 16. s. 3.) was beyond sea at the time that such action accrued, the *plaintiff* shall be at liberty to bring his action against him within the same time after his return, as is limited for such action by the statute of 21 Jac. 1. c. 16. and 4 Ann. c. 16. (e)

(5) So the words of the statute 4 H. 7. c. 24. of fines are, "that infants and their heirs shall take their action or entry within five years next after they are of the full age of 21 years;" but still it has been resolved, that an infant may, if he pleases, enter, or have his action, before he attains his full age, and avoid the fine. Plow. 366. a. *Stowel v. Zouch*. 1 Leon. 215. *Cotton's case*. There is a difference in *Cotton's case* as reported in 2 Inst. 519. and in 1 Leon. 211. Lord Coke reports the determination of that case to have been, that where a person is beyond sea at the time when a fine is levied, and never returns, he is within the exception made in the body of the

removed, and the statute begins to run, no subsequent disability will stop it. 4 T. R. 310. *Doe v. Jones*. Per Lord Kenyon, C. J.

[e] To a plea of the statute it is sufficient to reply that the defendant was in the *East Indies* at the time when the cause of action accrued, and that the plaintiff brought his action within six years after the defendant's return to

England: and it is no answer that the cause of action accrued in *India*, within the jurisdiction of the supreme court of *Calcutta*, where the plaintiff and defendant were both resident, and where the defendant continued to reside for more than six years after the cause of action accrued, the plaintiff having returned to *England* within that time, 13 East, 439. *Williams v. Jones*.

act of 4 H. 7. and his heir may enter or take his action *at any time*; but in case he does return, he or his heir must enter within five years after his return; and that where an infant, not being a party to a fine, and having a present right, dies during his infancy, his heir may enter or take his action at any time, and that the same takes place with respect to a man *non compos*, who dies in that situation, or to a man in prison who dies before he recovers his liberty, or to a married woman who dies in the life-time of her husband; for all these are within the reason adjudged of a person who is out of the realm, but never returns. But in *Leonard's* report of *Cotton's* case, *Anderson* chief justice is reported to have said, that although the person who has right is beyond sea at the time of the fine levied, and dies beyond sea, yet his heir is bound to enter or bring his action within five years *after the death of his ancestor*, provided he is of full age, and without impediment, for otherwise he shall be for ever barred. And the last resolution upon the subject is agreeable to the opinion of *Anderson*. That case was, that the ancestor died seised of certain premises leaving a feme covert his heir at law: upon his

death a stranger made a tortious entry into the premises, and was seised, and levied a fine with proclamations: The feme covert died while *under coverture*, no entry having been made on her behalf to avoid the fine, leaving one A. B. her heir, who laboured under none of the impediments mentioned in the statute 4 H. 7. of fines: it was adjudged that the fine was a bar to the right of A. B. the heir, unless he pursued his right within five years after the death of his ancestor, who died under coverture. And the court said that the true meaning of the statute was, that the rights of those persons who were under disabilities and of their heirs, were saved, as long as the disabilities continued and five years after, but no longer; therefore the heir, not being himself disabled, was barred, unless he pursued his right within five years after it accrued by the death of his ancestor under a disability [*f*] and consequently the heir, who was the plaintiff in that case, not having done so, was prevented by the fine from recovering the lands in question. 2 H. Blac. 584. *Dillon v. Leman*. See 4 Term Rep. 300. *Doe v. Jones*, and *Doe v. Shane*, Ibid. 306. note (b).

[*f*] i. e. within five years after the removal of the disability of his ancestor, by the death of the ancestor: for the

accruing of the right, strictly speaking, applies to the first taker only.

Case 22,

Webber *versus* Tivill.

Trin. 21 Car. II. Regis. Rot. 715.

Declaration in
assumpsit by a
surviving part-
ner.

London, }
to wit. }

BE it remembered, that heretofore, to wit, in the term of St. Hilary last past, before our lord the king at Westminster came John Webber merchant, by George Hill his attorney, and brought here into the court of our said lord the king then there his certain bill against John Tivill

merchant in the custody of the marshal, &c. of a plea of trespass upon the case, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit: *London*, to wit, *John Webber* merchant, complains of *John Tivill* merchant, being in the custody of the marshal of the marshalsea of our lord the king before the king himself, for that whereas the said *John Tivill*, on the 20th day of *September* in the year of our Lord 1663, at *London*, to wit, in the parish of *St. Mary le Bow* in the ward of *Cheap, London*, was indebted to the said *John Webber* and one *Robert Pearson* now deceased, whom he the said *John* has survived (1), in 1000*l.* of lawful money of *England*, as well for the money of the said *John Webber* and *Robert Pearson* by the said *John Tivill* before that time received and had, as for divers goods and merchandizes by the said *John Webber* and *Robert Pearson* before that time sold and delivered to the said *John Tivill*, and the said *John Tivill*, being so thereof indebted, in consideration thereof, undertook and faithfully promised the said *John Webber* and *Robert Pearson*, that he the said *John Tivill* would well and faithfully pay and content the said 1000*l.* to the said *John Webber* and *Robert Pearson* (2). And whereas also the said *John Tivill* afterwards, to wit, on the same day and year,

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TIVILL.

1st count, as well for money had and received, as for goods sold and delivered.

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2d count, on an account stated.

(1) It is necessary that all the persons with whom a contract has been made, if living, should join in the action, and if any of them are dead, that fact should be stated, as in this case. See 1 Saund. 291 *f. Cabell v. Vaughan*. [a]

(2) Hence it appears, that the common counts in a declaration may be contained in *one count*, stating that the defendant was indebted to the plaintiff in a given sum (large enough to comprehend all the money which the plaintiff can possibly recover,) in 1000*l.* for instance, as well for goods sold and delivered by the plaintiff to the defendant, as for money lent and advanced, and money paid by the plaintiff to the defendant, and money had and received by the defendant for the plaintiff, and

that in consideration thereof, the defendant promised to pay; Cro. Jac. 245. *Rooke v. Rooke*; and it should seem, that it is not necessary for the plaintiff to prove all the different causes of action so included in the same count, or in other words, to prove the whole consideration laid in order to entitle himself to recover, any more than it is when they are contained in different counts; but if he proves any one or more of the different causes of action, it is enough; for the defendant *being indebted to the plaintiff for any one cause*, appears to be a sufficient consideration for the promise (which the law raises) of the defendant to pay that money. It was formerly holden that upon a count for goods sold and deli-

[a] 4 B. & A. 374. *Jell v. Douglas*. the death of one of several defendants, S. P.; but it is otherwise in the case of 1 B. & A. 29. *Richards v. Heather*.

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to wit, at *London* aforesaid, to wit, in the parish and ward aforesaid, accounted together with the said *John Webber* and *Robert Pearson*, concerning divers other sums of money before that time due from the said *John Tivill* to the said *John Webber* and *Robert Pearson*, and then being in arrear and unpaid, and upon that account the said *John Tivill* was found in arrear to the said *John Webber* and *Robert Pearson* in 55*l.* 11*s.* 7*d.* (3) of like lawful money of *England*, in consideration whereof

vered, the plaintiff was bound to prove more than *one* particular thing sold, (though he may now recover for one thing only [b] :) and also to prove a price agreed upon, otherwise the plaintiff would fail. So upon a count for work and labour, use, and occupation, and other counts of the like nature, the plaintiff was bound to prove a price, or sum of money, agreed upon; and therefore where the plaintiff could only prove the delivery of the goods, or the doing of the work, or the occupation of the estate by the defendant and the like, without any price or sum agreed upon to be paid to the plaintiff, he was obliged to declare upon a *quantum valebant*, or a *quantum meruit*. But this strictness is now relaxed, and the present practice seems to be, that the plaintiff may, upon a count for goods sold and delivered, work and labour, use and occupation, and the like, recover what he shall prove to be due to him, notwithstanding there was not any price or sum of money agreed upon; though on the other hand, where the contract is for a certain price or sum of money, it seems to be understood, that the plaintiff cannot recover upon a count on a *quantum valebant*, or *quantum meruit*. And indeed these last mentioned counts seem

now to be of little or no use, so that, it seems, it is not often necessary to insert them in the declaration. Therefore, when the common counts are added to one or more special ones, for which the action is principally brought, there to prevent an unnecessary length in the record, and the expence unavoidably attending it, it will perhaps be a very proper practice to include the common counts in the same count, as is done here.

(3) The reason of laying this precise sum was, because at the time when this declaration was drawn, and indeed till within a few years ago, the plaintiff was obliged to state in his declaration, and prove, the *exact* sum agreed upon by both parties to be due, and also the very day of the account, otherwise the plaintiff would have been nonsuited; but this opinion is now exploded, and the plaintiff may, at present, recover *part* of the sum laid on this count, as well as on any other, and prove the account to have been on any day before the action was commenced. Bull. Nis. Pri. 129. Wherefore the present practice is, not to lay the precise sum in the declaration, but any sum large enough to cover the demand, as is done in other counts upon an *indebitatus assumpsit*. [c]

[b] So an acknowledgment of a debt, although consisting of one item only, is sufficient to entitle the plaintiff to a verdict on a count in *assumpsit* upon an account stated; 13 East, 249. Knowles

v. Michel. 5 M. & S. 65. Highmore v. Primrose.

[c] The same practice prevails in actions of debt on simple contract, in which it is held that the plaintiff may

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TIVILL.

Breach.

he the said *John Tivill* afterwards, to wit, on the same day and year, at *London* aforesaid, to wit, in the parish and ward aforesaid, undertook and then and there faithfully promised the said *John Webber* and *Robert Pearson*, that he the said *John Tivill* would well and faithfully pay and content the said 55*l.* 11*s.* 7*d.* to the said *John Webber* and *Robert Pearson*. Yet the said *John Tivill* not regarding his said several promises and undertakings in form aforesaid made, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said *John Webber* and *Robert Pearson* in the life time of the said *Robert Pearson*, and the said *John Webber* after the death of the said *Robert Pearson*, in this behalf, has not yet paid the said several sums of money, amounting in the whole to 1055*l.* 11*s.* 7*d.*, or any part thereof to the said *John Webber* and *Robert Pearson*, or either of them, in the life time of the said *Robert Pearson*, or to the said *John Webber* after the death of the said *Robert Pearson*, according to his said promises and undertakings in form aforesaid made, nor has he hitherto in any manner contented the said *John Webber* and *Robert Pearson*, or either of them, for the same, (although to do this afterwards, to wit, on the 1st day of *August* in the 20th year of the reign of our lord *Charles the Second*, now king of *England*, &c. at *London* aforesaid, to wit, in the parish and ward aforesaid, was by the said *John Webber* and *Robert Pearson* in the lifetime of the said *Robert Pearson* and by the said *John Webber* after the death of the said *Robert Pearson*, thereto requested)(4), but to pay the said 1055*l.* 11*s.* 7*d.* to the said *John Webber* and *Robert Pearson* in the lifetime of the said *Robert Pearson*, and to the said *John Webber* after the death of the said *Robert Pearson*, he the said *John Tivill* has altogether refused and still refuses to pay the same to the said *John Webber*; wherefore the said *John Webber* says he is injured, and has sustained damage to the value of 1200*l.* and therefore he brings suit, &c.

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And now at this day, to wit, on *Friday* next after the morrow of the *Holy Trinity* in the same term, until which day the said *John Tivill* had leave to imparl to the said bill, and

(4) Here too it is unnecessary to lay a time and place of request; the general allegation of *licet sapis requisitus* being deemed to be sufficient. See ante, 118. note 3.

recover what he shows to be due, count. See ante, vol. i. p. 288 a. notes; although less than the sum stated in the and post. 210 b. notes.

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TIVILL.

Plea.

*Non assumpsit
infra sex annos.*

then to answer, &c, before our lord the king at *Westminster* comes as well the said *John Webber* by his attorney aforesaid, as the said *John Tivill* by *John Fox*, his attorney, and the said *John Tivill* defends the wrong and injury when, &c. and says that he the said *John Webber* ought not to have or maintain his said action thereof against him, because he says, *that the said bill of the said John Webber was exhibited against him the said John Tivill in the said court of our said lord the king before the king himself at Westminster, on the 23d day of January in the 20th year of the reign of our Lord Charles the 2d now king of England, &c. and not before (5), and that he the said John Tivill did not undertake at any time within six years next before the said day of exhibiting the said bill of the said John Webber in manner and form as the said John Webber has above thereof declared against him the said John Tivill. And this he is ready to verify; wherefore he prays judgment if the said John Webber ought to have or maintain his said action thereof against him, &c.*

Replication.

that the money
in the said se-
veral under-
takings men-
tioned wholly
concerned the
trade of mer-
chandize.

And the said *John Webber* says that he, by any thing by the said *John Tivill* above in pleading alleged, ought not to be barred from having his said action thereof against the said *John Tivill*, because he says, that the said money in the several promises and undertakings aforesaid above mentioned, at the time of the making of the promises and undertakings aforesaid, became due and payable on trade had between the said *John Webber*, *Robert Pearson*, and the said *John Tivill*, as merchants, and wholly concerned the trade of merchandize, to wit, at *London* aforesaid in the parish and ward aforesaid. And this he is ready to verify; wherefore he prays judgment and his damages on occasion of the premises to be adjudged to him, &c.

Demurrer.

And the said *John Tivill* says, that the plea aforesaid by the said *John Webber* in manner and form aforesaid above in replying pleaded, and the matter in the same contained, are not sufficient in law for the said *John Webber* to have his said action thereof maintained against the said *John Tivill*; to which the said *John* has no necessity, nor is he bound by the

(5) The present form of pleading *non assumpsit infra sex annos*, is to omit the words in italicks, and to aver simply, "that the said (defendant) did not undertake and promise at any time within six years next before the day of exhibiting the said bill of the said

" (plaintiff) in K. B., or, of suing out of the original writ of the said (plaintiff) in C. B., in manner and form as the said (plaintiff) has above thereof complained against him; and this, &c. " wherefore, &c."

law of the land in anywise to answer. And this he is ready to verify: wherefore for want of a sufficient replication in this behalf, he the said *John Tivill*, as before, prays judgment, and that the said *John Webber* may be barred from having his said action thereof against the said *John Tivill*, &c.

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And the said *John Webber* says, that the plea aforesaid by the said *John Webber* in manner and form aforesaid above in replying pleaded, and the matter in the same contained, are good and sufficient in law for the said *John Webber* to have his said action thereof maintained against the said *John Tivill*; which said plea and the matter in the same contained he the said *John Webber* is ready to verify and prove as the court, &c. and because the said *John Tivill* does not answer the said plea, nor in anywise deny the same, he the said *John Webber*, as before, prays judgment, and his damages on occasion of the premises to be adjudged to him, &c. But because the court of our lord the king now here is not advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid before our lord the king at *Westminster*, until next after to hear their judgment of and upon the premises, because the court of our lord the king is thereof not yet advised, &c.

Joinder.

*Curia advisare
vult.*

Webber versus Tivill.

Case 22.

Trin. 21 Car. II. Regis. Rot. 715.

ASSUMPSIT by *Webber* merchant against *Tivill* merchant; the plaintiff declares that the defendant, on the 20th of September 1663, was indebted to the plaintiff and one *Pearson* deceased, whom the plaintiff has survived, in 1000*l.*, as well for money of the plaintiff and the said *Pearson* by the defendant before then received and had, as for divers goods and merchandizes by the said plaintiff and *Pearson* sold and delivered to the said defendant, and that the defendant being so indebted promised to pay the said sum. The plaintiff declares also, that the defendant had accounted with the said plaintiff and the said *Pearson* for money due from the defendant to the Plaintiff, and the said *Pearson* in arrear and unpaid and upon such account the defendant was found in arrear in 55*l.* 11*s.* 7*d.* and being so found in arrear he promised to pay

S. C. 2 Keb.
622. 634.
1 Lev. 287. S. C.
cited 1 Vent. 90.
The exception
in the statute of
limitations,
21 Jac. 1. c. 16.
s. 3. of accounts
which concern
merchandize,
that they shall
not be limited,
extends only to
accounts current
between mer-
chants, but not
to accounts
stated between
them.

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the said sum ; yet the said defendant has not yet paid the said several sums in the life time of *Pearson*, or after his death to the plaintiff, wherefore he brought this action.

The defendant pleads the common plea of the statute of limitations, namely, " that he did not undertake within six years next before the exhibiting of the bill, and this, &c. wherefore, &c."

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The plaintiff replies, that the monies in the several promises mentioned at the time of making the said promises became due and payable on trade between the said plaintiff and *Pearson* and the said defendant as merchants, and wholly concerned merchandize : and this, &c. wherefore, &c. upon which the defendant demurred in law. And the question was, whether this debt for which the plaintiff has declared in manner aforesaid be excepted out of the statute of limitations of 21 Jac. 1. c. 16., or not, the words of which are, " And be it further enacted, that all actions of trespass, detinue, actions for trover and replevin for taking away of goods and cattle, all actions of account, and upon the case, *other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants*, all actions of debt, grounded upon any lending or contract without speciality, &c." shall be sued within the several times prescribed in the said act, &c.

And *Jones* for the defendant argued, that this case is not excepted out of the statute ; for the statute intends to except nothing concerning merchandize between merchants, but only accounts *current* between them. And the reason was, because it often happens that merchants, who are as partners, or hold correspondence one with the other in several parts of the world, may have accounts current between them for several years before they have an opportunity of meeting to state their accounts, and therefore the statute does not mean to limit such accounts. But here it appears that the account for the 55*l.* 11*s.* 7*d.* was stated and agreed, and then immediately it becomes a debt certain, being ascertained by the account, and continually afterwards remains as a dead debt, and there is no continuing account between the plaintiff and defendant to save it out of the statute of limitations. And for this debt, after the account stated, the plaintiff might have brought his action of debt, which would without doubt have been limited to six years by the statute ; and therefore it is unreasonable that the plaintiff, by changing his action of

Debt lies on an account stated ; and such action is within the statute of limitations.

debt to an action on the *case*, should elude a statute which was made for the public good. And he likewise said, that actions of *account* on accounts between merchants are only excepted; but this is not an action of account, but a bare action on the *case*, which, as it appeared to him, was not excepted at all; And as to the other part of the declaration, he said, that was more clear, because it was only a bargain for wares sold, and for money lent; and although it concerned merchandize and was between merchants, yet that was no reason why it should be excepted out of the statute; for if it should be excepted, by the same reason every contract made between merchants would also be excepted, which was not the intention of the statute; for in the statute *accounts* between merchants only are excepted, and not *contracts* likewise. And as to the objection that may be raised that it is averred in the replication to be for merchandizes, he said, that the replication does not shew more than is contained in the declaration, namely, that the debt was for merchandize sold. In like manner every artificer or shopkeeper sells merchandize, and yet the contract is within the statute; and so it is in the present case; wherefore he concluded that this case was within the limitation and not saved out of the statute, and that the plaintiff ought to be barred.

Saunders for the plaintiff argued, that this case was excepted, and intended to be excepted, out of the statute; for he said that, because merchants trade among themselves at a great distance, and although they make a complete contract, yet it may be when they are at a great distance one from the other, as one here in *England*, and the other at *Constantinople*, therefore the statute does not intend to limit such contracts between merchants and their factors. And perhaps a contract between merchants may be made by their factors in parts beyond the sea at so great a distance, that the merchant plaintiff cannot know it, or have any notice of it from his factor, till one or two years after, and therefore a merchant will be in a worse situation than any other if such contracts should be limited. And as to the account, he said that it appeared to him to be expressly within the exception of the statute; for the words are, "all actions of account, and upon the *case*, other than such accounts as concern the trade of merchandize between merchant and merchant, &c." shall be limited, &c. So the statute does not only except actions of account concerning merchandize, but excepts the *accounts*

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Whether any other actions concerning accounts between merchants but actions of account are within the exception in

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the statute. See post note (7). Actions upon the *case* for money due on a contract between merchants for merchandizes sold, are limited by the statute and not within the exception in it.

WEBBER v. TIVILL. *themselves* concerning merchandizes, and therefore an action upon the case concerning such account is excepted also. And this is the more clear, because the exception of accounts comes immediately after actions upon the case, which shews that the statute intends to except such actions upon the case as concern accounts between merchants, as well as to except actions of accounts. For the precise words of exception do not except actions of account any more than actions upon the case, but only the accounts themselves; and then by construction of law any action, whether of account, or upon the case, concerning such accounts between merchants is excepted, and not limited to six years. For if another construction should be made no action at all will be excepted, and therefore, though the accounts themselves are not limited, yet if the action for the recovery of the debt due upon them shall be limited, the exception will be vain and delusive, which never was the intention of the maker of the act, wherefore he prayed judgment for the plaintiff.

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But the whole court was against the plaintiff for the reasons given by *Jones*. (6) And *Morton* justice said that no action

(6) The settled distinction seems now to be between an *open* or *current* account, and one that is *stated*; the former is holden to be within the exception of the statute, but the latter is *barred* by it. Thus where an account was made between F. and B. both merchants, and B. acknowledged 1200*l.* to be due, but F. claimed more, and before the whole account was finished, F. died; and his executor filed a bill in chancery against B., who pleaded in bar the statute of limitations, and *Jones*, *Croke*, and *Barkeley* justices, to whom it was referred, certified, that it was no bar, *because the account was not ended*, and also because it was between merchants. Sir W. *Jones*, 401. Sir *George Sandys v. Blodwell*. So where in *assumpsit* the doubt was, whether the declaration amounted to an *account stated*; for if it did, then from that time it was not within the exception in the statute, which says, "other than such accounts as concern the trade of merchandize

"between merchant and merchant;" for from the stating of the account that becomes a certain debt which was before an uncertain one. And therefore though an account be running 20 years or upwards between merchants, yet there is no danger from the statute because of the exception, which was made for a good reason. And this diversity between accounts stated and unstated, as it was said, had been often agreed, and was not denied by the court. 1 Sid. 465. *Martin v. Delbo*. S. C. 1 Mod. 70. 1 Vent. 89. 1 Lev. 298. So where in an *indebitatus assumpsit* for money had and received to the plaintiff's use, and a *quantum meruit* for wares sold, and an *insimul computasset*, &c. the defendant pleaded the statute of limitations, "*non assumpsit infra sex annos*;" the plaintiff replied, that this action was grounded on the trade of merchants, and brought against the defendant as factor, &c.; the defendant rejoined, that it was not an *action of account*, to which the

but an action of account was excepted by the statute; but the other justices said nothing thereto, but gave judgment for the defendant, that the plaintiff take nothing by his bill. (7) WEBBER v.
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It was also touched by the court that admitting the plaintiff's

plaintiff demurred; and it was said by the court that the saving in the statute extends only to accounts between merchants, their factors, and servants; and an action on the case will not lie against a bailiff or factor, where allowances and deductions are to be made, unless the account be adjusted, and stated, as it was resolved in *Sir Paul Neal's* case against his bailiff. [d] Where the account is once stated, the plaintiff must bring his action within six years, but if it be adjusted, and a following account is added, in such case the plaintiff shall not be barred by the statute, because it is a *running* account. 2 Mod. 311, 312. *Farrington v. Lee*. 1 Mod. 268. S. C. It was also adjudged in 4 Mod. 105. *Chievely v. Bond*, that the statute excepts only accounts which are current between merchants, and not any which are stated. It was also holden by *Jeffries* lord chancellor, that the statute of limitations is no plea in bar in an *open* account; 1 Vern. 456. *Scudamore v. White*: and in 2 Vern. 276. *Sherman v. Sherman*, it is said, that only *open* accounts between merchants are saved by the statute. And Lord *Hardwicke*, in a case before him in chancery says, "that it is a pretty difficult construction how to apply the exception in the statute relating to merchants' accounts.

It is not, that the defendant may not plead the statute in all cases where the account is closed and concluded between the parties, and the dealing and transaction over. It was not the meaning to hinder that; but it was to prevent *dividing* the account between merchants where it was a *running* account, when perhaps *part* might have begun long *before* the time of the statute, and the account never settled, and perhaps there might have been dealings and transactions *within* the time of the statute." 2 Ves. 400. *Welford v. Liddel*. So where the plaintiff, to a plea of the statute, replied a bill of *Middlesex*, and that the defendant promised to pay within six years before the suing out of the writ, and it appeared, that all the items in the bill whereon the demand arose, except the last, were above six years standing before the bill of *Middlesex* sued out; it was insisted for the plaintiff that the last item being within six years, and this being a current account never liquidated, should draw the former items out of the statute; but it was held by Mr. Justice *Danison*, that the clause in the statute of limitations about merchants' accounts extended only to cases where there were *mutual* accounts, and *reciprocal* demands between two persons; but if there were

[d] But where a factor refuses to account an action of *assumpsit* will lie for such refusal, for there is an implied promise to account, arising from his situation as factor. And the statute runs from the time of the refusal, 1 Taunt. 572. *Topham v. Braddick*. The action of account is now very

seldom resorted to; and notwithstanding the case of *Scott v. M'Intosh*, 2 Campb. 238., it has been held that the balance of an account, however numerous the items, may be recovered in *assumpsit*. 5 Taunt. 431. *Tomkins v. Willshear*. 1 Marsh. 115. S. C. 5 Taunt 432. note, *Arnold v. Webb*.

WEBBER v. TIVILL. replication had been good for the money on the account, and the action for that had not been limited by the statute, yet when the defendant had pleaded the statute to *both* promises in the declaration which was a good plea *prima facie*, and the

only a demand by A. against B. in the common way of business, as by a tradesman on his customer, that cannot be called merchants' accounts; and he was clearly of opinion that in that case, the statute was a bar to all demands of above six years standing. Bull. Nis. Pri. 149, 150. *Cotes v. Harris*. So in the case of *Cranch v. Kirkman*, before Lord Kenyon, Peake's Nis. Pri. 121. which was an action for goods sold and delivered by the testator, to which the defendant pleaded the general issue, and gave a notice of set-off for goods sold and delivered, &c. The defendant's set-off consisted of several items for goods sold at different times from 1783 to 1788: the plaintiff's demand accrued chiefly in the year 1783, but there were two small articles sold in the year 1789. It was contended on the part of the plaintiff that the greatest part of the set-off was within the statute of limitations, no promise being proved within six years. But Lord Kenyon said he thought this was within the exception in the statute as to merchants' accounts. He agreed that where the demand of one party arises long after the demand of the other, that shall not revive the antecedent account; but this was in the nature of a running and mutual account between the parties, and was precisely the case put by Mr. J. Denison in *Cotes v. Harris*, which his lordship said he particularly remembered, and of which he believed no one but himself had taken a note, the report of it which appeared in Buller's Nisi Prius having been furnished by him. It was then contended by the plaintiff's counsel, that the exception extended to no

other description of persons but *merchants*; but Lord Kenyon over-ruled it. However this opinion seems once to have prevailed, as appears from Chan. Cas. 152. *Sherman v. Withers*, where it was said that the exception as to merchants' accounts extends only to merchants trading beyond sea, and not to inland merchants; so *Atkyns J.* thought that no other sort of tradesmen but merchants were within the benefit of this exception, and that it did not extend to shop-keepers, they not being within the same mischief. 1 Mod. 270. *Farrington v. Lee*. Afterwards it was adjudged in *Catling v. Skoulding*, 6 Term Rep. 189., that if there be a mutual account of any sort between the plaintiff and defendant, for any item of which credit has been given within six years, *that is* such evidence, of an acknowledgment of there being such an open account between the parties, and of a promise to pay the balance, as to take it out of the statute. That case was, *assumpsit* for use and occupation, — the defendant pleaded the statute, and a set-off for goods sold and delivered. — Replication that the defendant did promise within six years. The plaintiff's testator was an attorney at H., the defendant was a dealer in spirituous liquors, and a tallow-chandler. There was due from the defendant to the testator at the time of his death, on the 20th of October 1788, for rent 20*l.* for nine years and a half, and 20*l.* for cash on account. During the time these arrears of rent were becoming due, the defendant furnished the testator with various articles in

plaintiff made an *entire* replication to the plea, and the replication was bad as to the *indebitatus assumpsit*, though sufficient as to the *insimul computasset*, yet the replication being entire, and bad in part, is bad in the whole, and ought to be

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the way of his trade. The balance due to the testator's estate at the time of his death was above 1711. *There never was any settlement of account between the testator and the defendant. The last half year's arrear of rent, and one or two of the last articles of the defendant's bill, were within six years before the plaintiff's writ was sued out.* It was objected by the defendant that this case was not within the exception in the statute; and if it were, it should have been replied specially, in order to have brought the case directly within the statute, and in support thereof this case of *Webber v. Tivill*, and the before mentioned case of *Farrington v. Lee* were cited; and it was further contended, that the exception was confined to accounts current between the parties, and therefore did not extend to cross demands of a distinct nature, as the demand in this case was; for otherwise every cross demand might be converted into an account current to prevent the operation of the statute; but it was adjudged by Lord Kenyon and the court, that where there is no *item* of account at all within six years before the action brought, the plaintiff will be precluded unless he can bring his case within the exception in the statute concerning merchants' accounts, and in such case his replication must bring his case within the statute. But it must be remembered that there the plaintiff is not barred, though there has been no transaction of any kind between the parties for six years; for by his replication he insists that his case never was within the statute, for that "the accounts were between merchant and merchant," &c. But the case before

the court steered wide of that objection; it was not doubted, but that a promise or acknowledgment within six years would take the case out of the statute, and the only question was whether there was not evidence of an acknowledgment. There were mutual *items* of accounts, and Lord Kenyon said he took it to have been clearly settled, that every new *item* and credit in an account, given by one party to the other, was an admission of there being some unsettled account between them, the amount of which was afterwards to be ascertained: and any act, which the jury might consider as an acknowledgment of its being an open account, was sufficient to take the case out of the statute. That daily experience taught us that if that rule were overturned, it would lead to infinite injustice. In *Cotes v. Harris* all the *items* were on one side; and *Denison J.*, who well knew what was the proper replication in such cases, and was well acquainted with the import of the statute of limitations, said, where all the *items* are on one side, the last *item* which happens to be within six years shall not draw after it those that are of longer standing; but it was not doubted there, but if there had been *mutual* demands, the plaintiff might have recovered.

(7) It appears by some of the cases cited in the preceding note, that the law is now taken to be, that the exception in the statute applies also to *actions on the case*; and the distinction is, that where there have been mutual, current, and unsettled, dealings and accounts between the parties, and any of the *items* are within six years, the plaintiff, to a plea of the statute that the

WEBBER v. adjudged wholly against the plaintiff who made it.—And
 TIVILL. this was a fault in the replication, as I conceive—*quod*
nota. (8)

defendant *did not* promise 'within six years; may reply *generally*, that the defendant *did* so promise, and the reason seems to be, because the mutual accounts between the parties, for any *item* of which credit has been given within six years, are of themselves *evidence* of there being such an open account, and of a promise to pay the balance: therefore that sort of evidence is as proper on the issue of *non assumpsit infra sex annos*, as any other evidence of an acknowledgment of the debt by the defendant, or of his promise to pay it, which is always admitted under that issue to take the case out of the statute. But where there is *no item* of account at all within six years, the plaintiff to the plea of the statute must reply *specialty*, as is done in this case, (p. 123.) in order to bring his case within the exception in the statute. However, it seems formerly to have been holden according to the argument of *Jones*, and the opinion of *Morton J.*, that no other action but of *account* was excepted by the statute. And perhaps the ground of that opinion was, that as it was agreed on all hands that an unsettled account was within the exception in the statute, and the true legal remedy where the account is unsettled, being by an action of *account*, therefore the construction of the statute was, that only actions of *account* were within the exception. In the before cited case of *Farrington v. Lee*, 1 Mod. 270., which was determined about five years subsequent to the present, it was resolved by *North* chief justice, *Wyndham* and *Scroggs* justices, that the exception in the statute goes only to actions of *account*, and not to *other* actions. And

they took a diversity betwixt an *account current*, and an *account stated*. After the account stated, the certainty of the debt appears, and all the intricacy of account is out of doors. And by *North*, if after an account stated, upon the balance of it, a sum appear due to either of the parties, which sum is not paid, but is afterwards thrown into a new account between the same parties, it is now slipped out of the statute again. And in the report of the same case, 2 Mod. 312. it is said, that if an action of *assumpsit* for goods sold, and on an *insimul computasset* be not barred, then the exception would extend to all actions between merchants and their factors, as well as to actions of *account*, which was never intended. So in an action on the case on a bill of exchange brought against the drawer, the defendant pleaded that the cause of action did not accrue at any time within six years before the exhibiting of the bill; the plaintiff replied, that he and the defendant are and were merchants, and that the bill of exchange was upon an account between them concerning merchandises, and it was adjudged by *Holt C. J.* and the court, upon demurrer, that bills of exchange for value received are not such matters of *account* as are intended by the exception in the statute of limitations; and that by the exception in the statute concerning merchants' accounts, no *other* actions are excepted but *actions of account*. Carth. 226. *Chevely v. Bond*. 1 Show. 341. S.C. To an action of *account* the defendant may plead the statute, and the plaintiff may reply that it was an account between merchants. See the form, Vid. Ent. 76. 3 Wils.

74, 79, 80. *Godfrey v. Saunders*. See (8) See 1 Saund. 28. *Manchester v. ante*, 61. 64. *Hodsdon v. Harridge*. 120. *Vale*, and the authorities cited in note 2. *Chandler v. Vilett*.

Coppin *versus* Hurnard.

Case 23.

Hil. 21 & 22 Car. II. Regis. Rot. 1251.

SUFFOLK, to wit. BE it remembered that heretofore, to wit, in the term of *St. Michael* last past, before our lord the king at *Westminster* came *Thomas Coppin* by *Edward Nelson* his attorney, and brought here into the court of our said lord the king then there his certain bill against *William Hurnard* gent. in custody of the marshal of a plea of debt, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit: *Suffolk* to wit, *Thomas Coppin* complains of *William Hurnard* gent. being in the custody of the marshal of the marshalsea of our lord the king before the king himself, of a plea that he render to him 9*l.* of lawful money of *England*, which he owes to, and unjustly detains from him, for this, to wit, that whereas on the 12th day of *September* in the 19th year of the reign of our lord *Charles* the 2d, now king of *England*, &c. certain suits and controversies were moved, had and depending, between the said *Thomas* and *William*, (1) for the pacifying and determining of which said suits and controversies, the said *Thomas* and *William* on the said 12th day of *September* in the 19th year aforesaid, at *Halesworth* in the county aforesaid, submitted (2) themselves to stand to the award, order, and judgment of one *William Cary* gent. and one *Edward Nelson* gent. arbitrators indifferently chosen between them, so as the said award should be made by the said arbitrators of and upon the premises before the last day of *Michaelmas* term then next following, if they could, and if they could not, then to the award and final determination of one *Richard Coke* esq. an umpire indifferently chosen between the said *Thomas* and *William Hurnard*, so as that award should be made of and upon the premises before the said last day of *Michaelmas* term. And the said *Thomas* in fact says, that the said *William Cary* and *Edward Nelson* did not make any award, nor could they make any award, between the said parties, of and upon the premises, before the said last day of *Michaelmas*

Same precedent. 2 Mod. Ent. 219.

Debt on an award.

(1) See ante 61. *Hodsdon v. Harridge*, note (1).

(2) Ib. note (2)

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Plaintiff and defendant submitted themselves to the award of W. C. and E. N. so as they made their award before the last day of *Michaelmas* term, and if they could not, then to the umpirage of R. C. so as he made his award before the said last day of *Michaelmas* term.

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The arbitrators
did not, nor
could make any
award.

(3) Ante, 62.
note (3).

(4) Ib. note (4).

(5) Ib. note (5).
Impar lance.

Demurrer.

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term; and the said *Richard Coke* having notice thereof, and having taken upon himself the burthen of the said award afterwards, and before the said last day of *Michaelmas* term aforesaid, to wit, on the 27th day of *November* in the aforesaid 19th year of the reign of our said lord the now king, at *Halesworth* aforesaid, awarded between the said *Thomas* and *William Hurnard* of and upon the premises (3) in form following, that is to say, that the said *William Hurnard* on the 24th day of *December* then next following, should pay to the said *Thomas Coppin* 9*l.* as well for money due from the said *William Hurnard* to the said *Thomas*, as for the costs and charges of the said *Thomas* in and about the prosecuting and defending of the said several suits, and that on payment of the said 9*l.*, the said *Thomas* and *William* should give to each other general acquittances; (4) whereby an action has accrued to the said *Thomas* to demand and have from the said *William Hurnard* the aforesaid 9*l.* Yet the said *William* (although often required) has not yet paid the said 9*l.* to the said *Thomas*, but to pay the same to him has hitherto altogether refused and still refuses, to the damage of the said *Thomas* of 10*l.* and therefore he brings suit, &c. (5)

And now at this day, to wit, on Saturday next after the octave of *St. Hilary* in this same term, until which day the said *William Hurnard* had leave to imparl to the said bill, and then to answer, &c. before our lord the king at *Westminster*, comes as well the said *Thomas Coppin* by his attorney aforesaid, as the said *William* by *William Cary* his attorney. And the said *William Hurnard* defends the wrong and injury when, &c. and says that the said *Thomas* ought not to have or maintain his said action thereof against him, because he says that the declaration aforesaid, and the matter in the same contained, are not sufficient in law for the said *Thomas* to have his aforesaid action thereof maintained against him the said *William Hurnard*, to which said declaration he the said *William Hurnard* has no necessity, nor is he bound by the law of the land in anywise to answer. And this he is ready to verify; wherefore for want of a sufficient declaration in this behalf, he the said *William Hurnard* prays judgment, and that the said *Thomas* may be barred from having his said action thereof against him the said *William*, (6) &c.

(6) See 5 Mod. 191. *Leaves v. Bernard*, where it is holden, that if a plea is ever so informal, beginning and ending in *abatement*, and indeed partaking

very little of the usual form of a demurrer, but is nevertheless meant to be, and in substance is, a demurrer, it is good.

And the said *Thomas* says, that he, by any thing by the said *William Hurnard* above in pleading alleged ought not to be barred from having his aforesaid action thereof against the said *William Hurnard*, because he says, that the declaration aforesaid, and the matter in the same contained, are good and sufficient in law for him the said *Thomas* to have his aforesaid action thereof maintained against the said *William Hurnard*, which said declaration and the matter in the same contained, he the said *Thomas* is ready to verify and prove, as the court, &c. and because the said *William Hurnard* does not answer the said declaration, nor has hitherto in any wise denied the same, the said *Thomas* prays judgment, and his debt aforesaid, together with his damages on occasion of the detention of the said debt, to be adjudged to him, &c. But because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day therefore is given to the parties aforesaid, before our lord the king at *Westminster*, until day next after to hear their judgment of and upon the premises, because the court of our said lord the king here is thereof not yet, &c.

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Joinder in Demurrer.

Coppin versus Hurnard.

Case 23.

Hil. 21 & 22 Car. II. Regis. Rot. 1251.

DEBT upon an award by *Coppin* against *Hurnard*; the plaintiff, declares that whereas there were divers suits and controversies depending between the plaintiff and defendant, for the determining of which, the plaintiff and defendant, on the 12th of *September* in the 19th year of the reign of the now king, submitted themselves to stand to the award of *William Cary*, and *Edward Nelson*, arbitrators indifferently chosen between them, so as the said award should be made by the said arbitrators of and upon the premises before the last day of *Michaelmas* term then next following, if they could, and if they could not, then to the award and final determination of one *Richard Coke*, esq. an umpire indifferently chosen between the parties, so as the said umpirage should be made of and upon the premises before the said last day of *Michaelmas* term aforesaid. And the plaintiff in fact says, that the arbitrators did not make, nor could they make, any award between the parties aforesaid of and upon the premises before

8. C. 1 Sid.

428. 455.

Sir T. Raym.

187.

1 Lev. 285.

1 Mod. 15.

2 Keb. 562.

619.

If a submission be to arbitrators, and if they disagree, then to an umpire, and the award and umpirage are limited to the same day, the power of the umpire is void, unless the arbitrators disagreed and declared they would not intermeddle any more; and the plaintiff, in such

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case, must shew
in his declara-
tion, the cause
why the arbitra-
tors could not
make their
award.

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the said last day of *Michaelmas* term, whereof the said umpire, having notice, and having taken on himself the burden of the award, afterwards, and before the said last day of *Michaelmas* term, to wit, on the 27th of *November* in the *19th year aforesaid, made his umpirage on the premises between the parties, namely, that the said defendant at *Christmas* following should pay to the plaintiff 9*l.* for money due to the plaintiff, and also for the costs of several suits at law; and that on payment of that money both parties should give general acquittances to each other. And the plaintiff avers non-payment of the money, *whereby an action has accrued, &c.* to which declaration the defendant demurred in law.

And it was argued by *Jones* for the defendant, that the umpirage was void, because the umpire has made his award within the time limited for the arbitrators to make their award. For the arbitrators have power to make their award at any time before the last day of *Michaelmas* term following; and the umpire has no power to make his award but only in case the arbitrators cannot make their award. But it does not appear here that the arbitrators could not make their award; for although it is averred in the declaration that the arbitrators *could not* make their award, yet this avails nothing, unless a special cause be shewn why they could not make their award. For suppose that, after the umpire has made his award, the arbitrators had also made their award, which of them is the defendant bound to perform? Certainly he is bound to perform the award of the arbitrators; wherefore it follows that the umpire has made his award sooner than he ought, and therefore the umpirage is void in law. And he cited *Barber and Giles's* case, 1 Roll. Abr. 261.*, where the submission was to arbitrators, and if they disagreed then to the umpirage of J. S., so as the award, or umpirage, be made before the first day of *May*; in this case the umpire cannot make any award before the arbitrators have disagreed; and the arbitrators have power to make their award at any time before that day, and so no time limited for the umpire, and therefore his power merely void, as it is said in the book. And he also cited the case of *Bernard v. King*, 1 Roll. Abr. 262.†, where the submission was to arbitrators, so as they make their award *to-morrow*, and if they cannot then agree, then to the umpirage of T. S., so as he make his umpirage *to-morrow*, or *the next day*, in this case the umpire cannot make his umpirage on the morrow, although the arbitrators.

* S. C. cited
2 Vent. 115.

† S. C. Sty.
306. S. C. cited
1 Mod. 275.
If a submission
be to arbitrators
so as they make
their award *to-
morrow*, and if

declare that they would not any more intermeddle with the award. But he said that, perhaps the umpirage in this case might have been good, if the arbitrators had met before the day and disagreed, and therefore had relinquished their power to the umpire, and had so declared it, and all this matter had appeared in the declaration; but now no such matter appears in the declaration; wherefore he concluded that the declaration was not good, and prayed judgment for the defendant.

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they cannot agree, then to an umpire, so as he makes his umpirage to-morrow, or the next day, in this case the umpire cannot make his umpirage on the morrow.

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Saunders for the plaintiff argued, that the umpirage was well made, and the question is not so properly whether the umpirage be good, or not, as whether the submission of the parties be wholly void as to the umpire, or not; for by the submission, as well the umpirage as the award, was limited to be made before the last day of *Michaelmas* term, and therefore the umpirage ought of necessity to be made within the time limited to the arbitrators to make their award, because the same time was limited for the one as for the other. And therefore to construe the submission to be void, which is the proper act of the parties, is a very hard case, if by any reasonable construction it can be otherwise. And he said, that here it may be well construed in this manner, namely, the parties submit to the award of the arbitrators to be made before the last day of the term, if they make any award; and if they do not make any, and the umpire shall make an umpirage within the same time, then the parties shall stand to such umpirage. And this was the true sense and intention of the parties, and is not void, but stands well with law. And he compared this submission to a case in *Dyer*, 347. a. where the condition of an obligation was, that the obligor before such a day should make a lease to the obligee for the term of thirty-one years, if A. B. would assent to it, and if he would not assent, then for twenty-one years, there the obligor was bound to make the one lease or the other before the day, although A. B. might assent at any time before the day; and if he assented, the obligor was obliged to make a lease for thirty-one years, but if he did not, yet he was bound to make a lease for twenty-one years within the time. And as to the case of *Bernard v. King*, he said, that there was not any reason to construe the umpirage to be good, being made within the time which the arbitrators had to make their award, because the umpire had a longer time limited to

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him to make his umpirage, after the time limited to make the award was determined, wherefore there was no necessity to make the umpirage within the time limited for the award. But otherwise it is in the case at bar, for here the award and umpirage were limited together within the same time, so that the umpirage ought to be made within the time limited for the award, or else it cannot be made at all. And as to the case of *Barber v. Giles*, he answered, that the case was that the arbitrators had time to disagree until the last minute of the time limited for making the award or umpirage; but he said, that if the arbitrators will meet before the time is so elapsed, and then disagree and declare their disagreement, the umpire may well afterwards, and within the time, make his umpirage, and it will be good as may be collected out of the same book. For the book says, that the umpire cannot make his umpirage until the disagreement of the arbitrators, which implies that he may after their disagreement within the time limited: but if the arbitrators defer their disagreement to the last instant of time, then is the power of the umpire merely void, as the book says, namely, by this matter *ex post facto*, but the submission was good at first, and might have taken effect in the umpirage; and the said book, he said, does not imply the contrary. And here it is averred that the arbitrators did not make, *nor could* make any award, so that it was impossible for the arbitrators to make their award, as it is averred, wherefore the umpire might well make his umpirage; for perhaps one of the arbitrators was dead, and therefore the arbitrators did not make, *nor could* they make, an award, &c. And to prove the submission good the case of *Fyall and Varier*, 1 Roll. Abr. 261.*, is express, for there was the same time for the arbitrators and for the umpire to make the award, or umpirage, and it was there said that it was good, because it was the express agreement of the parties. And in this case the umpire having made an umpirage and the arbitrators having made no award, he concluded that the umpirage was well made, and prayed judgment for the plaintiff.

* S. C. Godb. 241. pl. 334. The express agreement of the parties will make an umpirage good, though the same time is limited for the arbitrators and for the umpire to make the award or umpirage.

And after advising for one or two terms, the court in this term gave judgment for the defendant. And the principal reason was, because the averment in the declaration was not sufficient; for the plaintiff has averred that the arbitrators *did not make, nor could make, any award*; and it is true, that

at the time of the umpirage made, the arbitrators had not made any award, but they might, either then, or afterwards, have made their award, and consequently the umpire has made his umpirage before it came to his turn. And the averment that the arbitrators *could not*, is idle and of no signification; for nothing appears to the court to the contrary but that the arbitrators might have made their award, if they would. But true it is, if the plaintiff had shewn that one of the arbitrators had been dead, then it would have appeared to the court that the arbitrators *could not* make their award, but it does not appear so now. So if the plaintiff had declared that the arbitrators had disagreed about making the award, and they had declared that they would not intermeddle any more with the the award, then by the court, except *Twysden* justice, the umpire might well have made his umpirage: but *Twysden* held that the submission as to the umpire was altogether void. The case, however, as it appears upon the record, was adjudged for the defendant by the whole court.

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Note, that the case of *Jennings and Vandepuut* in Cro. Car. 263, and in 1 Roll. Abr. 262., was agreed by the court, namely, that the arbitrators, within the time limited to make their award, may choose an umpire to make an umpirage after the time for making their award is determined. (7)

Arbitrators may within the time limited to make their award choose an umpire to make an umpirage after the time for their award is determined.

(7) In the case of *Fyall v. Varier*, 1 Roll. Abr. 261. pl. 3. it is held, that, if there be a submission to arbitrators with this clause, "that if they do not end it within ten days they shall nominate another that shall end it within ten days," and they do not agree within ten days, upon which they appoint another who makes an award within ten days, the umpirage is good, because it is the appointment of the parties and their special agreement, and by making the umpire the authority of the arbitrator determines.

If arbitrators chose an umpire before the time allowed for their award was expired, it was formerly holden, that such nomination was *ipso facto* void, though they absolutely resolved not to make any award themselves. 1 Salk. 70. *Reynolds*

v. Grey. S.C. 12 Mod. 120. 1 Ld. Raym. 222. It was also the opinion formerly, that the power of the arbitrators was not determined by the election of an umpire within the time limited to themselves, unless they absolutely refused to make any award; and even in that case the umpirage made within the time was void; for though the arbitrators might choose an umpire at any time during the continuance of their power, yet the umpire could not act until the time for the arbitrators was expired; but the arbitrators might still have made an award. 1 Lev. 302. *Donavan v. Mascul*. S.C. Sir T. Raym. 205. 1 Mod. 274. But the law seems now to be otherwise. As where in debt on bond, with a condition to perform the award of A. and B. so as they made their award on or

before the 29th of June, and if they made no award, then to perform the umpirage of him whom A. and B. should elect, &c. upon *nul agard* pleaded, the plaintiff replied, that A. and B. on the 29th of June elected C. to be umpire, and that he had made his umpirage, &c. and assigned a breach, &c. And upon demurrer exception was taken, that A. and B. had all the 29th of June to make their award; but it was over-ruled; for per Holt chief justice, if a submission be made to A. and B. so as they make their award *before midsummer*, and if they do not agree, then to such umpire as they shall choose, so as he makes his umpirage *before midsummer*, and an umpirage is made accordingly, it is good, because the arbitrators determined their power before by electing an umpire. And so it was resolved in the case of *Travers v. Twisleton*. 1 Lev. 174. 2 Keb. 15. But if an umpire be named in the submission, he cannot make his umpirage, before the time is expired which is given to the arbitrators to make their award. 1 Ld. Raym. 671. *Mitchell v. Harris*. S. C. 12 Mod. 512. 1 Salk. 71, 72. [a] So where the submission was "so as the award be made by the arbitrators on or before the 21st of May, and if not made before that day, then to stand to the award of an umpire, &c." the arbitrators made no award, but chose an umpire on the 20th of May, who awarded, that the defendant should pay to the plaintiff 40*l.* before the 11th day of June following; it was objected that they had no power to choose an umpire on the 20th of May because the arbitrators themselves had power till the end of 21st of May to make their award: but the objection was disallowed, for the arbitrators not having made any award, the award of the umpire was good, and judg-

ment for the plaintiff. 1 Lutw. 541. 544. *Elliot v. Chevall*. So where in debt upon bond for the performance of the award of J. S. and J. N. so as they made it on or before the 1st day of July, and if not, then to the umpirage of J. D. so as he make it on or before the 2d day of July. The arbitrators made no award, but J. D. made his umpirage on the first day of July; and upon demurrer it was objected that it was made before the time allotted by the submission, because the arbitrators had the whole day, namely, the first day of July to make their award, and this umpirage was made on the first day, and the case of *Barnard v. King* was cited; but it was adjudged that the umpirage was good, for the parties had expressly given to the umpire the first day for executing his authority; and the court did not think the reason of the resolution of the case cited to be of any force, namely, that the court would be in confusion to adjudge which should be good in case the arbitrators and the umpire had made several awards; for the award of the arbitrators if they had made any would be adjudged good, but if they had not, then the umpirage should bind, and there would be no confusion upon concurrence of authority as to the time, for the umpire had not an absolute, but only a conditional concurrence, namely, if the arbitrators make no award within the time, and they thought the case in Roll. Abr. was not good law. Sir T. Jones, 167, 168. *Case v. Dare*. S. C. 2 Show. 164. And in 2 Term. Rep. 644, 645. *Roe v. Doe*, it was objected that the two arbitrators, who had the power of naming an umpire, had named one before they had entered into the examination of the subject at all; but the court said that there was not any ground for the objection;

[a] *Contrà*, 3 M. & S. 559. *Smailes v. Wright*. See post. 193 a. n. [c].

for it rather seemed to be the fairest way of choosing an umpire. And they said that it had been solemnly determined in that court about thirty years before, that arbitrators might elect an umpire the instant they began to take the matter into consideration. See also 2 Barnard, K. B. 154. *Cowel v. Waller*. [b] And it seems to be now settled, that arbitrators cannot proceed on a reference, after they have once named an umpire, for then their authority ceases,

though the time for making the award is not expired. Rep. Prac. C. B. 116. *Danes v. Monsey*. Vin. Arbitrament, 97. pl. 18. S. C. Hence it seems to follow, that the umpire may make his umpirage before the time which is allowed the arbitrators to make their award, is expired, notwithstanding what is said by Lord Holt in the before cited case of *Mitchell v. Harris*. 1 Ld. Raym. 671. [c] It was also adjudged in C. B. by three judges against the opinion of

[b] In 4 Taunt. 232. *Beck v. Sargent*, where the submission was, that, if the arbitrators did not make their award by a certain day, then the parties were to abide the award of an umpire to be chosen by the arbitrators, it was held by Mansfield C. J. that their power to appoint an umpire did not begin till they failed to make an award on the day appropriated. It must be observed, however, that the decision of this point was not necessary for the case, the question not being whether the choice of an umpire was made too soon, but whether it was made too late: and that in the following term, in the case of *Harding v. Watts*, 15 East, 556., where the point was expressly raised, it was held that the arbitrators may choose the umpire either before or after the time for making their own award expires, provided it be within the time given to the umpire.

[c] It was agreed by Lord Holt in this case (as appears in the former part of this note) that in general the umpire might make his umpirage before the time allowed the arbitrators to make their award, had expired; but he excepted the case where the umpire is named in the submission. This exception, however, has since been overruled in 3 M. & S. 559. *Smailes v. Wright*. That case was as follows. The submission was to two, as arbitrators, and

a third as umpire, so as the arbitrators made their award by a certain day: and if the arbitrators did not make their award by that time, then the submission bond was not to be avoided, provided the umpire made his award on or before a subsequent day. The arbitrators finally disagreed, and declared they would make no award, whereupon the umpire made his umpirage, two days before the expiration of the time allowed the arbitrators; and it was held good: though the court allowed it was defeasible in the event of the arbitrators making their award within due time. And in 5 M. & S. 193., *Sprigens v. Nash*, where the circumstances were the same as in *Smailes v. Wright*, except that the arbitrators were to appoint the umpire, the umpirage was held good, though it did not state that the arbitrators had disagreed.

With regard to what is said above, respecting the determination of the power of the arbitrators, by the nomination of the umpire, it should seem that the law is now different, though there has been no express decision to that effect. Lord Ellenborough C. J. however, in *Harding v. Watts*, ubi supra, said, "It is very convenient for arbitrators to begin by appointing an umpire, because they are more likely to agree upon a proper choice of one before they themselves begin to quar-

Polluxfen C. J., that where a submission was to two arbitrators, and if they make no award, then to the umpirage of such person as they should choose, and they chose one J. N., who refused, and then they chose another, such nomination was a good one, for their power was not so determined by the election of the first umpire, that upon his refusal they could not appoint another; and the first nomination being void by his refusal was the same thing as if they had never chosen an umpire at all. 3 Lev. 263. *Trippet v. Eyre*. S. C. 5 Mod. 457. 2 Vent. 113. 1 Show. 76. But in a subsequent case it was said by *Holt* C. J. that if arbitrators have authority to choose an umpire, and they choose

one accordingly, they have executed their authority, and cannot make another election, though the umpire does not accept of the umpirage, but it is otherwise if they elect upon express condition that he does not accept it; for then he is no umpire unless he accept it; but *Rokesby* justice doubted whether an express condition would make a difference, because the words "if the party elected will accept it," seem to be implied in the election. 1 Salk. 70. *Reynolds v. Gray*. S. C. 1 Ld. Raym. 222. 12 Mod. 120. But the better opinion seems to be that if the umpire elected refuses, the arbitrators may elect another *toties quoties*. Com. Dig. Arbitrament (F). [d]

"rel;" from which it is evident he did not suppose that the appointment of the umpire would determine the authority of the arbitrators. The same may be collected from *Doe v. Roe*, cited above, where the court said it was the fairest way for the arbitrators to choose the umpire before they entered into the examination of the subject. The result of the recent cases on these subjects seems to be, that in cases where the arbitrators are to appoint the umpire, they may do so at any time before or after the time limited for making their award, so as the appointment is within the time allowed for making the umpirage. That in all cases where the arbitrators disagree the umpirage may be made within the time allowed the arbitrators for making the award; subject, however, in cases where an umpire is named in the submission, to become nugatory, if an award be made by the arbitrators within the period allowed them. And it is probable that this would be extended to cases where the arbitrators are to nominate the umpire, because it seems to be considered

that their authority is not determined by such nomination.

With respect to the *mode* of nominating an umpire, it has been held that, where each of two arbitrators nominated a person to whom the other did not object, and then the arbitrators drew lots which of the two persons so nominated should be chosen, the person on whom the lot fell was duly elected; 16 East, 51. *Neale v. Ledger*; but where one arbitrator objected to the person proposed by the other, and afterwards the arbitrators tossed up which of them should appoint the umpire, and the arbitrator proposing won, and appointed the person objected to, such appointment was held bad. 2 B. & A. 218. *Wells v. Cooke*.

[d] The authority of the arbitrators may determine by the *death* of either of the parties to the submission, before the award is delivered. 1 Marsh. 366. *Potts v. Ward*. 7 Taunt. 571. *Toussaint v. Hartop*. 1 B. Moore, 287. S. C. 2 B. & A. 394. *Cooper v. Johnson*, which last case seems to have overruled the distinction taken in *Bower v. Taylor*.

So where arbitrators, having chosen an umpire according to their power, afterwards joined with him in making his award, it was held notwithstanding

to be a good one, for in law it is the umpirage of the *umpire only*, who was at liberty to take what advice, or opinion, or assistance he pleased. 3 Burr.

7 Taunt. 574. in notes. Caldwell, 30. S. C., between a reference, where the submission is merely the act of the parties, and where a verdict is taken, subject to the award of an arbitrator.

In the case of *Cooper v. Johnson*, Abbot C. J. suggested that it might be very proper in orders of nisi prius in future to insert a clause to obviate the inconvenience arising from the death of either party, before the making of the award. This suggestion has been acted upon, and it is now the usual practice in London and Westminster to insert such a clause.

The power of the arbitrators may also be determined by the revocation of the parties. It is a general rule that the submission, whether by deed or other writing, or by judges' order, or order of nisi prius, may be revoked at any time before the award is made. 1 Bingham. 89. *Clapham v. Higham*. But after the submission has been made a rule of court, the party cannot rescind it without incurring a contempt of court by a breach of that rule. 7 East, 612. *Milne v. Gratrix*.

Although a party may revoke his submission, yet as he cannot destroy his agreement to submit, he will in general be liable to an action for so revoking. Thus if the submission be by bond, the revocation operates to render the condition impossible and makes the bond single. 8 Co. 159. *Vynior's case*. And if it be by agreement, under seal or otherwise, an action of covenant or assumpsit, as the case may be, will lie for the breach of such agreement by the revocation. 5 B. & A. 507. *Marsh v. Bulleel*. 1 Dowd. & Ryd. 106. S. C. A difference was at one time taken be-

tween submissions by deed and those by parol or writing not under seal; the latter being held to be revocable with impunity: for it was said, "*ex nuda submissione non oritur actio*." 8 Co. 159. *Vynior's case*; in the same manner as it was held, that where the submission was without deed, and the award was not merely for the payment of money, but for the performance of a collateral act, the party had no remedy to enforce it. But the law is now taken to be, that the party may have assumpsit in both cases. 2 Saund. 62 b. 2 Ld. Raym. 1040. *Purslow v. Baily*. 2 Keb. 10. 20. 24. *Newgate v. Degelder*. Sid. 281. S. C.; and see 5 B. & A. 507. *Marsh v. Bulleel*. But where no time is limited for the arbitrators to make their award, either party may apply to them to proceed within a reasonable time, and if they neglect to do so may revoke his submission, without subjecting himself to liability to an action. 3 M. & S. 145. *Curtis v. Potts*. It does not appear whether the submission in that case was by deed or by parol, but the same rule would seem to apply to either case.

If, notwithstanding a proper revocation and notice of it to the arbitrators, the party makes the submission a rule of court, and the arbitrators proceed to make their award, the revocation may be pleaded to an action on the award, and the court will refuse to enforce the award by attachment, 7 East, 608., and will set aside the rule; 5 Taunt. 453. *King v. Joseph*; but they will not set aside the award. Ibid.; the reason of which, it is submitted, may be, that by the revocation, the jurisdiction of the court in the matter is determined:

1474. *Soulsby v. Hodgson*. 1 Black. Rep. 463. S. C. [e] And if the arbitrators hear all the evidence, and afterwards disagree, and state the evidence to the

umpire, on which he makes his award *without re-examining the witnesses*, it is good, unless he is required to examine them before he makes his award. 4 Term

although in *King v. Joseph*; *Gibbs C. J.* is reported to have assigned as a ground for the court's refusal, that setting the award aside would have deprived the other party of his action of covenant for not abiding the award. But with submission, this ground appears not a good one, for in 5 B. & A. 507., *Marsh v. Bulteel*; 1 Dowl. & Ryl. 106. S. C., where a count stated the defendant's covenant to obey, abide by, and perform an award, and that he would not hinder or prevent the arbitrators from making their award, and after stating the making of an award, the breach alleged was, non-performance of that award, it was held a good plea to aver, that before the award made, the defendant revoked the authority of the arbitrators: from which it would seem to follow, that there is no use in the existence of the award after a revocation, as it is on the breach of the agreement to submit to, and not on the breach of that to perform an award, that the party must proceed. See also the judgment of Lord *Ellenborough* in 5 East, 266. *Charnley v. Winstanley*.

It is to be observed, that in 1 Bingham. Rep. 87. *Clapham v. Higham*, the court of C. B. are reported to have set aside an award under the same circumstances as those of *King v. Joseph*, where they had refused to do so, with this difference only, that in *Clapham v. Higham* the submission was by a judge's order, while in *King v. Joseph* it was by deed. This difference appears immaterial to the decision; and as the real point under discussion, in *Clapham v. Higham*, was, whether a revocation was effectual when the submission was by a judge's order, it may be doubted whether the

court intended to decide any thing contrary to *King v. Joseph*, or in fact to do any thing more, by setting aside the award, than to determine that a revocation, where the submission is by a judge's order, produces the same consequence as where the submission is by deed. But where the order directs (as it usually does) not only the submission of the parties, but that either party wilfully preventing the arbitrator from making his award shall pay such costs as the court shall think reasonable; such order may be made a rule of court, after a revocation, in order to enable the court to dispose of the question of costs. 2 B. & A. 395. *Aston v. George*. In his judgment in this case, *Abbott C. J.* remarked, that "there is a material distinction between a reference under a judge's order and a reference by deed. In the latter case, the submission to arbitration is alone made a rule of court, by virtue of the statute. It follows, therefore, that when the submission is revoked there remains nothing which can be made a rule of court; a judge's order, on the other hand, may be made a rule of court without reference to any statute."

There may be a virtual, as well as an express revocation, such as the marriage of a *feme sole*, before award made, for it is in law a civil death of all her rights. 5 East, 266. *Charnley v. Winstanley*. But the bankruptcy of the plaintiff, after reference by order of N. P., and before award made, was held not to operate as a revocation, for it would not have put an end to the suit which the bankrupt had instituted, nor can it therefore put an end to the arbitration founded upon

Rep. 589. *Hall v. Lawrence*. So if an arbitrator makes his award without examining the witnesses *on oath*, that is no objection to the validity of the award, unless it be made at the time of their examination. 1 Bos. & Pull. 91. *Rid-oat v. Pye*. [f]

that suit. 4 B & A. 250. *Andrews v. Palmer*.

[e] 4 Taunt. 232. *Beck v. Sargent*. S. P.

[f] It may be proper here to observe that a prospective agreement, to refer all matters in dispute which may hereafter arise, cannot be pleaded in bar of an action for the recovery of

such disputed matter: for the courts will not suffer themselves to be ousted of their jurisdiction by the private agreement of the parties. 8 T. R. 139. *Thompson v. Charnock*: and it seems doubtful whether any action will lie for refusing to refer pursuant to such prospective agreement. 2 Bos. & Pull. 131. *Tattersall v. Groot*.

Term. Sanctæ Trin.

ANNO REGNI REGIS, CAR. II. 22.

Case 24.

Barber versus Fox.

Same precedent.
1 Mod. Ent.
134.

Yorkshire,
to wit.

BE it remembered that heretofore, to wit, in Easter term last past, before our lord the king at Westminster came *Stephen Barber* by *James Smith* his attorney, and brought here into the court of our said lord the king then there his certain bill against *Humphry Fox* in the custody of the marshal, &c. of a plea of trespass upon the case, and there are pledges of prosecution, to wit, *John Doc* and *Richard Roe*, which said bill follows in these words, to wit: *Yorkshire*, to wit, *Stephen Barber* complains of *Humphry Fox* being in the custody of the marshal of the marshalsea of our lord the king before the king himself for this, to wit, that whereas one *Anthony Fox*, father of the said *Humphry*, late of *Thorpe* in the parish of *Hatherseidge* in the county of *Derby* in his life time, to wit, on the 17th day of *February* in the year of our Lord 1654, by his certain writing obligatory, sealed with the seal of the said *Anthony*, bearing date the same day and year, acknowledged himself to be held and firmly bound to the said *Stephen* in the sum of 92*l.* 12*s.* of lawful money of *England* (1), with a condition to the said writing subscribed, that if the said *Anthony*, his heirs, executors, or administrators, or any of them, should pay to the said *Stephen*

A. F. father of the defendant was bound to the plaintiff by bond in the penal sum of 92*l.* 12*s.*

with a condition that if the said A. F. his heirs, executors, or

(1) Here, it seems, should have been added this allegation, "to be paid to the said *Stephen*, whenever after the said *Anthony* should be thereto re-

" quired, for which payment well and truly to be made he the said *Anthony* bound himself and his heirs by the said writing obligatory."

the full and just sum of 51l. 16s. of like money of *England*, at or upon the 18th day of *February*, which should then be in the year of our Lord 1656, at or within the then mansion-house of the said *Stephen Barber* situate in *Uxhill* in the said county of *York*, without fraud, or further delay, then the said writing obligatory should be void, and of no effect, otherwise should stand and remain in full force, and virtue; which said 51l. 16s. the said *Anthony* in his life time, or the said *Humphry* after the death of the said *Anthony*, (of which said *Anthony* he the said *Humphry* is son and heir) have not, nor hath either of them, paid to the said *Stephen*, on the said 18th day of *February* in the said year of our Lord 1656, at the said mansion-house of the said *Stephen* according to the form and effect of the said condition, whereby the said writing obligatory became forfeited. And the said *Stephen* afterwards, to wit, on the 1st day of *January* in the 21st year of the reign of our lord *Charles* the second now king of *England*, &c. intended to sue the said *Humphry*, as son and heir of the said *Anthony* his father, on the said writing obligatory to him in form aforesaid forfeited; of which said intention the said *Humphry* having notice, he the said *Humphry* on the day and year last aforesaid at *Rotheram* in the county aforesaid, in consideration that the said *Stephen*, at the special instance and request of the said *Humphry*, would then forbear his suit so intended to be prosecuted by him the said *Stephen* on the said writing obligatory against the said *Humphry* as son and heir of the said *Anthony*, undertook, and then and there faithfully promised the said *Stephen*, that he the said *Humphry* would well and faithfully pay and content the said *Stephen* the said 51l. 16s. when he should be thereto afterward required. And the said *Stephen* in fact says, that he, giving credit to the aforesaid promise and undertaking of the said *Humphry*, did then and there at the said instance and request of the said *Humphry* forbear his suit in form aforesaid intended to be prosecuted by him the said *Stephen* on the said writing obligatory for the said 92l. 12s. against the said *Humphry* as son and heir of the said *Anthony* his father, yet the said *Humphry* not regarding his aforesaid promise and undertaking, but contriving and fraudulently intending craftily and subtilely to deceive and defraud the said *Stephen* in this behalf, has not paid the said 51l. 16s. to the said *Stephen* according to the said promise and undertaking, nor has he in anywise hitherto contented him for the same, (although to do this, the said *Humphry* afterwards, to

**BARBER v.
FOX.**

administrators
should pay 51l.
16s. the bond
should be void,

[135]

but which was
not paid either
by A. H. in his
life-time, or by
the defendant
his heir after
his death.

whereby the
bond was for-
feited,

and defendant,
having notice of
plaintiff's in-
tention to sue
him on the bond
as heir, in con-
sideration plain-
tiff would for-
bear his in-
tended suit, un-
dertook to pay
the money.

Averment that
plaintiff did for-
bear his intend-
ed suit.

Breach.

BARBER v.
FOX.

wit, on the 10th day of *February* in the 22d year of the reign of our said lord the now king, at *Rotheram* aforesaid in the county aforesaid, was requested by the said *Stephen*,) but to pay the same to him, or in anywise to content him for the same has altogether refused, and yet refuses, to the damage of the said *Stephen* of 100*l*. And therefore he brings suit, &c.

The defendant pleads *non assumpsit*, and verdict and judgment for the plaintiff.

Case 24.

Barber *versus* Fox.

[136]
S. C. 1 Vent.
159.
2 Keb. 811.836.
An *assumpsit* is not maintainable against an heir on a promise to pay money due upon the bond of his ancestor, unless the heir was expressly bound in the bond.

ASSUMPSIT, that whereas one *Anthony Fox*, the father of the defendant, by his writing obligatory became bound to the plaintiff in 92*l*. 12*s*. upon condition to pay him 51*l*. 16*s*. at a certain day past, which was not paid, and so the obligation became forfeited, and afterward *Anthony Fox* the father died, and the defendant was his son and heir, wherefore the plaintiff intended to sue the defendant as son and heir on the said bond; and the defendant, having notice of it, in consideration that the plaintiff, at the special instance and request of the defendant, would forbear his intended suit against the defendant as son and heir on the said bond, undertook and promised the plaintiff to pay him the said 51*l*. 16*s*. on request; and the plaintiff averred forbearance, and yet the defendant had not paid the said money, although on such a day and year he was requested, &c. to the damage of the plaintiff, &c. On *non assumpsit* pleaded a verdict was found for the plaintiff.

And now *Weston* moved in arrest of judgment, that here was no consideration; for it does not appear that the defendant was suable upon this bond as son and heir, for it is not shewn that *Anthony Fox*, the defendant's ancestor, whose son and heir he is, *had bound himself and his heirs* by the said bond: and if the heir is not bound expressly by name, he is not bound at all, and therefore here was no consideration to found this promise; wherefore judgment was staid until it should be moved on the other side.

And afterwards *Saunders* for the plaintiff moved for judgment, and said, that though the declaration would have been bad on demurrer, yet it is now made good by the verdict,

for the jury have found that the defendant was bound as heir in the said bond, for otherwise there was no consideration; and they ought to have found that the defendant did not undertake, &c. if there was no consideration, or otherwise they may be attainted for a false verdict; but they having found that the defendant did undertake and promise as the plaintiff has declared, it ought of necessity now to be intended that *Anthony Fox* had bound himself *and his heirs* by the said bond.

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FOX.

Sed non allocatur; for by the court, though they would intend a personal lien against an executor, if he has assets in his hands, though it be not averred, yet they will not intend a real lien against an heir, though he be bound by the bond of his ancestor, unless it is expressly alleged; and therefore they would not intend it here, though it be after verdict; wherefore judgment was arrested; *quod nota.*(2)

[137]

(2) But where a father, being indebted to J. S. in 100*l.* by bond, made a *fraudulent* deed, and thereby gave all his goods to his son, and died, and upon a conversation had concerning the fraudulent deed, the son promised J. S. in consideration he would deliver the bond to him, and make an acquittance and discharge to him of the debt, to pay him the 100*l.*; and an action having been brought thereon, and a verdict for the plaintiff, it was moved in arrest of judgment, that the consideration was not good, because it did not appear that the son was liable to the payment of the debt, either as heir, or executor or administrator, or executor of his own wrong; and therefore delivering the bond, and making the acquittance or discharge to him, was not good. But it was answered and resolved, that the consideration was good; and it should be intended that he was liable, or at least that the discharge was made to the party who was liable, for the plaintiff promised to discharge the debt, and that should be intended to be made to the party who was liable to the payment of it, or else

it would be no discharge. 1 Sid. 31 pl. (9.) If that was in truth a fraudulent deed of gift of the goods by the father to the son, as stated in the case, the son, after his father's death, would be chargeable for this debt as an *executor of his own wrong*, though possession of the goods had been delivered to him at the time of the deed. For it is holden, that if a man makes a fraudulent gift of his goods in his life-time to oust his creditors of their debts, the vendee after his death shall be charged for them. 1 Roll. Abr. 549. (C.) pl. 3. And the only way in which he can be so charged is, as executor of his own wrong. 2 Leon. 223. *Stamford's* case. Cro. Jac. 271. *Hawes v. Leader*. Yelv. 197. S. C., where it is said, that the goods are liable to the creditors in the hands of the vendee, as an executor of his own wrong, if the deed of gift be fraudulent. And the reason is, because every intermeddling without authority after the death of the party makes the person so intermeddling an executor of his own wrong. Dyer, 166. b. *Stoke's* case. And the same point was recognised in the case of *Edwards v. Harben*,

2 Term Rep. 587, where it is adjudged that, if a creditor takes an absolute bill of sale of the goods of his debtor which is fraudulent against creditors, and the debtor dies, and thereupon the vendee takes and sells the goods, he is liable to be sued as executor of his own wrong for the debts of the deceased. Hence it seems to follow that the son was in the case in 1 Sid. liable to the payment of the debt, at least to the extent of the value of the goods, as executor of his own wrong, and therefore the delivering of the bond to him, and giving him an acquittance, appears to be a sufficient consideration to support his promise. For which reason that case seems to differ materially from the principal one. So where in *assumpsit* the plaintiff declared, that the defendant's father bound himself to the plaintiff in the sum of 400*l.* for the payment of 200*l.* and that the father was dead, and the defendant was his son and heir, to whom the plaintiff intimated that he intended to sue him as heir for the debt, and thereupon the defendant in consideration of forbearance promised to pay &c. and upon *non assumpsit* pleaded, and a verdict for the plaintiff, it was moved by *Twysden* serjeant in arrest of judgment, because it was not said that the father bound himself *and his heirs*, and therefore it did not appear that the defendant was liable to an action, and so the consideration void. But it was adjudged that it should be intended, it being found by the jury, according to Hob. 216. *Bidwell v. Catton*, and the plaintiff had judgment, (but otherwise between *Barber and Fox*, Trin. 22 Car. 2. K. B.) *St. Paul v. Earl of Rivers*, Trin. 1656. K. B. cited in Sir T. Raym. 128. But this case being afterwards cited in *Hunt v. Swain*, 1 Lev. 165. S. C. Sir T. Raym. 127. 1 Sid. 248., the court paid no regard to it, and *Twysden J.*

said, he was counsel in it, and it was at the time taken to be a hard case. The case of *Hunt v. Swain* was *assumpsit* against the heir on a promise, in consideration the plaintiff would forbear him until *Michaelmas*, to pay. After verdict for the plaintiff, judgment was staid, because it did not appear that the ancestor bound himself *and his heirs*, and the consideration was not to forbear generally, but to forbear him, who did not appear to be chargeable; but it was agreed that if the declaration had been that J. S. was indebted to him and died, and the defendant being *his executor* in consideration of forbearance, promised, &c. as before, it would have been good, because an executor is liable without express words; whereupon the plaintiff, perceiving the judgment of all the court against him, prayed *nil capiat per billam*, with an intent to commence a new action.

So where the plaintiff declared that A. since deceased, was indebted to him in a certain sum, and after his death in consideration of the premises, and that he at the defendant's instance, would forbear and give day of payment of the debt, (not stating to whom he was to forbear) the defendant promised, &c. : it was holden on demurrer to be no consideration for the promise; for a promise can only be sustained on consideration of benefit to the defendant, or of detriment to the plaintiff; and unless there was some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. 4 East, 455. *Jones v. Ashburnham*.

It is a principle of law that an executor does more actually represent the person of his testator, than the heir does the person of his ancestor: for if a man binds himself, his *executors* are bound, though they are not named; but it is not so of the *heir*. Co. Litt. 209. a. And as it is not stated in the

principal case, that the ancestor of the defendant bound himself *and his heirs*, without which there is no cause of action against the defendant, the declaration is defective in omitting so material an allegation, and therefore the verdict does not cure it. For though a verdict will cure a title which is imperfectly or defectively stated, yet, if the declaration states either a defective title, or totally omits to state any title or cause of action at all, a verdict will not cure such a defect. See 1 Saund. 328 c. *Stannel v. Hogg*. It seems therefore that the decision of the court in this case is well founded. Indeed it has been said, that if a man binds himself *and his heirs* in a bond and dies, and after the obligee sues the heir, who has no assets descended to him, and the heir in consideration that the plaintiff will not sue him, promises to pay the money, this is no consideration to maintain an *assumpsit*; because the defendant was not chargeable without assets. 1 Roll. Abr. 28. pl. 57. Lord Gray's case; but it should seem that this would not now be so considered; for in the principal case it appears that the judgment was founded upon the want of alleging in the declaration that the ancestor had bound himself *and his heirs*; and if the heir had been liable, it seems to follow that *forbearance* would have been adjudged a sufficient consideration to support the promise without regarding whether he had assets or not at the time. And in Lord Gray's case, if the defendant had not any assets he ought to have pleaded it to the action upon the bond; but if, instead of so doing, he desires the obligee to forbear his suit, and in consideration thereof promises payment, that appears to be a sufficient consideration: for though the forbearance may be of no benefit to the defendant, it might have been attended with a loss to the plaintiff not to pro-

ceed in his suit. So the promise of an heir, in consideration of forbearance of a suit in chancery to which he was not liable, will not support an *assumpsit*; as where in *assumpsit* the declaration stated, that there were controversies between him and the defendant for the profits of certain lands which the defendant's father had taken in his lifetime; and that he had purchased a writ out of chancery against the defendant to the intent to exhibit a bill against him. Upon the return of the writ for the said profits, the defendant, in consideration he should surcease his suit, promised that if he could prove that his father had taken the profits, or had possession of the land under the title of the plaintiff's father, he would pay for the profits of the land, and averred that he had so proved it; and upon *non assumpsit* it was found for the plaintiff. But judgment for the defendant; for by the court it is no consideration; for if the father of the defendant did take the profits, that is no reason why his son should answer for them; and therefore the suit is unjust, and the staying of it no good consideration; but if the suit had been for evidences, or otherwise, the staying of it had been a good consideration; and besides the plaintiff did not allege that he was heir or executor, and so had no colour to charge him; and if it had been so alleged, yet it was no cause to charge him for a personal tort. Cro. Eliz. 206. *Tooley v. Windham*.

But with respect to *executors*, if a creditor forbears at their request to sue them, that is considered as a sufficient consideration to charge them *de bonis propriis*, whether they had assets or not at the time of the promise, and therefore it is not necessary to aver in the declaration that they had assets. As if A. to whom the testator was indebted, comes to the executor, and says that

he intends to sue him for the debt, whereupon the executor promises, in consideration that the plaintiff will forbear him for a reasonable time, to pay him, and A. accordingly forbears to sue him for a reasonable time, that is a good consideration to charge the defendant, in an action upon the case, out of his own estate, without assets; for by this promise it is intended as well to forbear to sue the executor as to forbear the debt; and a forbearance of a suit is a good consideration without assets at the time of the promise; 1 Roll. Abr. 24. pl. 33. upon a demurrer, where the defendant pleaded that he had no assets when the promise was made. So if a man declares upon a promise against an administrator that the intestate was indebted to him in 10*l.* by bond, and died, and the defendant, being his administrator, in consideration of the premises, and that the plaintiff *would spare him* till such a time after, promised to pay him the debt, and avers that he spared him till the time, and the defendant had not paid him, &c. though he did not say that he would spare him *the debt*, or to *sue him*, yet it shall be so intended, and therefore the consideration is good. 1 Roll. Abr. 15. pl. 3. So it was said by *Hale* C. J. that though a bare accounting by the executor with a creditor of his testator will not bind the executor to pay *de bonis propriis*, yet a promise in consideration of forbearance will. 2 Lev. 122. *Hawes v. Smith*. Also

where the plaintiff having a debt owing to him from the testator on a simple contract, the executor in consideration the plaintiff would forbear to sue him until such a time, promised to pay, and the plaintiff averred that he did forbear accordingly, this is a good promise; but if the *heir* had promised, on forbearance of the suit, to pay this debt, no *assumpsit* would have lain against him, because without consideration, for the *heir* is not chargeable to any debt without specialty. Yelv. 55, 56. *Fish v. Richardson*. Cro. Jac. 47. S. C. So where in *assumpsit* the plaintiff declared, that J. S. devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him; the defendant pleaded divers bonds and judgment, and no assets *ultra*, upon which the plaintiff demurred, and had judgment without argument; for it is not material whether he had assets or not, for he is charged upon his own promise, in consideration of forbearance; and a forbearance of a suit for a legacy is a sufficient consideration. 2 Lev. 3. *Davis v. Reyner*. S. C. 1 Vent. 120. 2 Keb. 758., in which last book it is said, that if it had appeared by the declaration that the plaintiff had no cause of action, the forbearance would not be sufficient. See 5 Term Rep. 690. *Deeks v. Strutt*, that no action at law lies for a legacy; [a] but in

[a] S. P. per Lord *Kenyon* C. J. *Peake's* N. P. 103. *Farish v. Wilson*. But if there be a bequest of a specific chattel, whether personal or real, upon the assent of the executor, the interest in it vests in the legatee, so as to enable him to recover it by an action at law. 3 East, 120. *Doe v. Guy*. See ante, vol. i. 279 a. note (5). And it seems that a legacy payable out of land may

be recovered by action against the heir or terre tenant. 2 Salk. 415. *Ewer v. Jones*. 2 Sid. 21. *Butler v. Butler*. In *Doe v. Guy*, *Lawrence* J. is reported to have said, that "what was said by the court in *Deeks v. Strutt*, must be taken with relation to the case then before them, which was an action for a legacy not founded upon any *express* assent of the executor, but endeavoured to be sup-

this case the forbearance might have been to sue in Chancery, or in the ecclesiastical court, for the legacy, and then the consideration may perhaps be a good one. So if A. together with B. is bound to C. for the proper debt of B., and A. pays the money, and B. dies and make D. his executor, and D. in consideration that A. will forbear to sue him until such a time, promises to pay him, this is a sufficient consideration to support the promise. 1 Sid. 89. *Scott v. Stevens*. So if an executor be indebted to J. S. in 100*l*. who demands the money, the executor is chargeable only in respect of assets, and not otherwise; but if he promises to pay the debt at a future day, it becomes his own debt, and to be satisfied out of his own estate. Yelv. 11. *Goring v. Goring*. See Cro. Eliz. 91. *Trevenian v. Howell*. 1 Vez. 126. *Reech v. Kennegal*. However though the executor should promise upon a sufficient consideration to pay the debt of his testator, yet his promise is not binding upon him by the statute of frauds, 29 Car. 2. c. 3. s. 4, unless it be in writing. See 1 Saund. 210, 211. *Forth v. Stanton*, notes, 1, 2. But a bare promise to pay by the executor, does not make him liable to answer out of his own estate, but he is still chargeable only as executor, and to the extent of the assets in his hands, in the same manner as he

would have been had no such promise been made. And as we have already seen, (1 Saund. 211. note (2) it makes no difference, though the executor had made such promise in writing. This point was fully established in *Rann v. Hughes*, both in the *exchequer chamber* and *house of lords*. 7 Term Rep. 350. note (a). 7 Brown. P. C. 556. S. C.

Upon the principle that there was no cause of action against the defendant at the time of the promise, and therefore forbearance no consideration, *Pratt C. J.* held that an action would not lie against a married woman, who gave a promissory note as a *feme sole*, and after her husband's death, in consideration of forbearance, promised to pay it; and though it was insisted, that the defendant being under coverture at the time of giving the note, it was voidable for that reason; but by her subsequent promise, when she was of ability to make a promise, she had made herself liable, and the forbearance was a new consideration; yet the C. J. held the contrary, and that the note was not barely voidable, but absolutely void; and forbearance, where originally there was no cause of action, is no consideration to raise an *assumpsit*. But he said it might be otherwise where the contract was but voidable; and so the plaintiff was called. 1 Str. 94. *Loyd v. Lee*. [b] So a promise to revive a

ported upon an implied assent in law, on account of a sufficiency of assets, which implication the court held that they could not raise." It does not therefore appear to have been decided that an action will not lie against an executor upon an express promise by him in consideration of assets, or upon an express admission by him that he has money in his hands for the payment of such legacy. On the contrary the cases of *Atkins v Hill*, Cowp. 284.

and *Hawkes v. Saunders*, Ibid. 289., are authorities to shew that an action will lie on an express promise, and 1 B. & B. 219., *Gorton v. Dyson*, that an action for money had and received will lie upon an admission.

[b] But where the declaration alleged that the defendant, a married woman, having a settlement of lands to her separate use during coverture, with an absolute power of disposing of them by will, gave a bond to the plaintiff to

a security which is void in its creation, is void, though if it were only voidable, the subsequent promise may revive it. As where all the creditors of an insol-

vent consented to accept a composition for their demands upon an assignment of his effects by a deed of trust, to which they were all parties, and one of

secure money lent by him to a third person at her request, and after her husband's death, in consideration of the premises, promised that her executors should settle the bond, it was held that an action would lie against her executors on such promise, since there was a good moral consideration for the promise; although if it had been laid in the declaration that the promise was made in consideration of forbearance, the action would have failed, on the authority of *Loyd v. Lee*, and *Barber v. Fox*. 5 Taunt. 36. *Lee v. Muggeridge*. But though a moral obligation be a good consideration for an express promise, it has never been carried further so as to raise an implied promise in law. Therefore where a pauper belonging to the parish of B. was taken suddenly ill in the parish of A., and money was laid out by A. in his cure, it was held that there was no implied promise on the part of B. to reimburse A. 2 East, 505. *Atkins v. Banwell*. *Watson v. Turner*, Bull. Ni. Pri. 129., has been cited as an instance of a moral consideration supporting a promise, in which a surgeon having attended a pauper without any direction from the overseer, the latter promised to pay, and it was held a good promise: but this case, as is observed in *Selwyn's Ni. Pri.* 57. tit. *Assumpsit*, may be supported on strict legal principles, without resorting to the doctrine of moral obligation; for it is plain that the overseer is bound by law to afford medical assistance to a sick pauper, and the parish in which the sick pauper is found is liable. 4 M. & S. 275. *Lamb v. Bunce*. Where, however, a pauper is resident in another parish, but receives relief from his own, and is attended by a

surgeon, there is both a legal and moral obligation in the parish to which he belongs to pay the surgeon. 1 B. & A. 104. *Wing v. Mill*. And where orders of removal are made and suspended, under 35 Geo. 3. c. 101. (which cannot be in the case of casual poor, 10 East, 25. *Rex v. St. James's, Bury*, 4 B. & A. 660. *Rex v. St. Lawrence, Ludlow*), the parish to which the pauper belongs is liable. See further as to a moral obligation being a sufficient consideration for a promise. 3 Bos. & Pull. 247. *Wennall v. Adney*, and the note of the learned reporters in that case.

Upon the same principle of moral obligation, an express promise to pay a debt, for which the remedy is taken away by statute, as in cases of insolvency or bankruptcy, is binding without any new consideration. Cowp. 544. *Trueman v. Fenton*.

But the promise must be unequivocal; 1 Stark. 370. *Fleming v. Haynes*. 4 Taunt. 613. *Mucklow v. St. George*. 5 Esp. 198. *Lynbui v. Weightman*; and if conditional, it must be so declared on, and the plaintiff must show the condition performed. 1 Chitty's Rep. 609. *Campbell v. Sewell*. 2 H. Bl. 116. *Besford v. Saunders*.

And it is held in K. B. that the defendant cannot be arrested on such subsequent promise. 3 M. & S. 595. *Wilson v. Kemp*. *Scous* in C. B. 6 Taunt. 563. *Horton v. Moggridge*.

The consideration to support an assumpsit must move from the plaintiff. 1 Vent. 6. *Bourne v. Mason*. 1 Str. 592. *Crow v. Rogers*. Must be such as he has the means of performing or causing to be performed. 2 Lev. 161. *Harvey v. Gibbons*. Must not contravene any rule of

them, before he executed, obtained from the insolvent a promissory note for the residue of his demand by refusing to execute until such note was made; it was adjudged that the note was void in law, as a fraud on the rest of the

creditors; and a subsequent promise to pay it was a promise without consideration, which would not maintain an action. 2 Term Rep. 763. *Cockshott v Bennett*. [c]

the common law, the express provisions of any statute, or the general policy of the law. 3 Taunt. 226. *Scott v. Gilmore*. 11 East, 300. *Law v. Hodson*. 5 B. & A. 241. *Burnyeat v. Hutchinson*. Nor be contaminated with any illegal transaction. Cowp. 341. *Holman v. Johnson*. 3 T. R. 454. *Biggs v. Lawrence*. 4 T. R. 466. *Chugas v. Penaluna*. 5 Taunt. 181. *Hodson v. Temple*. 1 M. & S. 593. *Langton v. Hughes*. 6 T. R. 405. *Booth v. Hodgson*. 2 H. Bl. 379. *Mitchell v. Cockburne*. 2 Bos. & Pull. 371. *Aubert v. Maze*. 1 Taunt. 6. *Branton v. Taddy*. Park on Insurance. 8. *Sullivan v. Greaves*. 4 Burr. 2069. *Faithney v. Reynolds*. 3 T. R. 418. *Petrie v. Hanway*. 3 Taunt. 6. *Webb v. Brooke*. 8 T. R. 600. *Child v. Morley*. 3 Ves. 379. *Ex parte Mather*. 14 Ves. 192. *Ex parte Daniels*. 1 Ball. & Beat. 366. *Ottley v. Brown*. 1 Bos. & Pull. 554. *Lightfoot v. Tenant*. 1 Bos. & Pull. 296. *Farmer v. Russell*. 6 T. R. 61. *Steers v. Lashley*. 13 Ves. 313. *Ex parte Bulmer*. 2 Str. 1249. *Barjeau v. Walsley*. 2 Wils. 309. *Alchinbrook v. Hall*. 7 T. R. 630. *Brown v. Turner*. 1 M. & S. 751. *Ex parte, Bell and Others*. 4 Taunt. 165. *Clayton v. Dikky*. 7 Taunt. 246. *Simpson v. Bloss*. 3 B. & A. 179. *Cannan v. Bryce*.

Nor with any fraudulent transaction; see the next note: nor be of an immoral nature. *Crisp v. Churchill*. Selwyn's Ni. Pri. p. 68. tit. Assumpsit. Ibid. *Howard v. Hodges*. 1 Esp. 13. *Girarday v. Richardson*. 4 Esp. 97. *Fores v. Johnes*.

Subject to these restrictions "any act of the plaintiff from which the de-

fendant or a stranger derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered by the plaintiff, with the consent, express or implied, of the defendant, or in the language of pleading, *at the special instance and request of the defendant*." Selwyn's Ni. Pri. tit. Assumpsit. 46. 1 Taunt. 523. *Williamson v. Clements*. 4 Taunt. 611. *Bailey v. Croft*. 5 B. & A. 117. *Longridge v. Dorville*: in which last case the consideration was the giving up a litigated point, which was in truth against the plaintiff. See also 2 Taunt. 59. *Hill v. Bishop of Exeter*. But the consideration must be of some value; 3 Leon. 88. *Smith v. Smith*. 1 Roll. Abr. 23. pl. 29.; and the mere doing what the plaintiff was bound in law to do is not sufficient; Penke, 72. *Harris v. Watson*; 2 Campb. 317. *Still v. Meyrick*; nor natural love and affection; Cro. Eliz. 735. *Bret v. J. S. et ux.*; nor past cohabitation, unless the plaintiff was seduced by the defendant. 4 B. & A. 650. *Binnington v. Wallis*.

[c] See further to the same point, 3 T. R. 551. *Jackson v. Duchaise*. 4 T. R. 166. *Jackson v. Lamas*. 6 T. R. 143. *Feise v. Randall*. 4 East, 372. *Leicester v. Rose*. 3 Anst. 910. *Fawcett v. Gee*. 1 Anst. 202. *Cecil v. Plaistow*. 5 Taunt. 109. *Wheelewright v. Jackson*. 1 Hred. & Bing. 447. *Wells v. Girling*. Compositions of the same kind as that made in *Cockshott v. Bennett* are binding on creditors, if made by deed, containing

a release or covenant not to sue, although there be no consideration for the deed. But if made verbally or by an instrument not under seal, they are not binding, even where the composition money is actually paid, unless there be a good consideration for them, for acceptance of a less sum is no satisfaction of a greater. 5 East, 230. *Fitch v. Sutton*. 2 H. Bl. 317. *Lynn v. Bruce*. 2 T. R. 24. *Heathcote v. Crookshanks*. 1 Str. 426. *Cumber v. Wane*. 5 Rep. 117. *Pinnel's case*. Such consideration may be the security of some other person for the whole or a part of the composition money; 11 East, 390. *Steinman v. Magnus*, or the agreement of the other creditors to accept the same sum out of a particular fund to be provided; 1 B. & A. 46. *Cork v. Saunders*; because where one creditor is induced to agree to a composition, under the supposition that another creditor joins, if either of them depart from the agreement and be allowed to recover the whole, a manifest fraud would be committed on the other. 2 Stark. 417. *Wood v. Roberts*. The debtor, however, must take care to perform the terms of the agreement; and therefore where the notes of the debtor, guaranteed by a third party, were agreed to be given for the composition, it was held incumbent on the debtor to tender them, and not on the creditor to demand them; and as the debtor did not tender them to one particular creditor, although he delivered them to all the others, that creditor was remitted to his original demand for the whole. 2 M. & S. 120. *Cranley v. Hillary*. A party who executes a composition deed is bound to the extent of the whole debt due to him, if he do not specify the amount opposite

his signature. 1 B. & A. 103. *Harry v. Wall*.

Where nothing is said in the agreement about collateral securities, a creditor will not, by availing himself of them, commit any fraud upon the other creditors, who have no such securities; 1 B. & A. 1. *Thomas v. Courtney*; unless the persons against whom he enforces those securities, have their remedy against the insolvent, and so by circuit the creditor receives more from the estate than the others. Ibid. 6. per *Bayley J.* And if it be part of the agreement that securities shall be given up to the insolvent, any creditor receiving the money on those securities will be held to receive it to the use of the insolvent. 1 Bos. & Pull. 286. *Stock v. Mawson*.

It is a common practice to insert in composition deeds a proviso that the deed shall be void, if not executed in a given time by all the creditors whose debts amount to a given sum: and where such a proviso was omitted, but before the deed was executed by a person who was to be surety for the composition money, it was stated in his presence, that the deed should be void if not executed by all the creditors, and he at the same meeting delivered the deed in the ordinary way, and with the usual words, it was held that the deed was delivered as an escrow, and that the surety on the failure of some creditors to execute it was not bound by the deed. 4 B. & A. 440. *Johnson v. Baker*. Persons whose debts it is agreed by the terms of the deed shall be paid in full, are not within that proviso. 5 B. & A. 869. *Wells v. Greenhill*. 1 Dowl. & Ryl. 493. S. C.

Turner *versus* Davies.

Case 25.

Pasch. 22 Car. II. Regis. Rot. 576.

England, } OUR lord the king has sent, to his justices as-
to wit. } signed to hold pleas before the king himself, his writ close in these words, to wit: *Charles* the 2d, by the grace of God, of *England, Scotland, France, and Ireland*, king, defender of the faith, &c. to our justices assigned to hold pleas before us greeting: By the *great complaint* of *Edward Turner* it is grievously complained of, and shewn to us, that whereas one *Edmund Spicer* heretofore, to wit, on the 1st day of *July* in the 20th year of our reign, at *London*, died intestate, after whose death, to wit, on the 21st day of *July* in the 20th year of our reign aforesaid, at *London* aforesaid, administration of all the goods and chattels which were of the said *Edmund Spicer* at the time of his death was committed by *Thomas Exton* doctor of law, surrogate lawfully appointed of the venerable *William Wells* doctor of divinity official of the archdeacon of the archdeaconry of *Colcestor*, to one *Alexander Davies* as the principal creditor of the said *Edmund*, and that by virtue of the said administration to the said *Alexander Davies* so as aforesaid committed, *the said Alexander Davies, as administrator of the goods and chattels of the said Edmund Spicer, afterwards, that is to say, in the term of St. Michael in the said 20th year of our reign, came into our court before us at Westminster in the county of Middlesex by Richard Somer then his attorney, and brought then there into the said court his certain bill against the said Edward Turner in the custody of the marshal, &c. of a plea of trespass upon the case, and there were pledges of prosecution, to wit, John Doe and Richard Roe, by which said bill the said Alexander Davies as administrator of all and singular the goods and chattels aforesaid, by the name of Alexander Davies administrator of all and singular the goods and chattels, rights, and credits which were of the said Edmund Spicer, complained of the said Edward Turner then being in the custody of the marshal of our marshalsea before us for this, to wit (1), that*

Auditâ quereld
Co. Ent. 89. a.
A similar preced-
ent.

E. S. died in-
testate.

Administration
granted to the
defendant,

(1) The present method of declaring form: "And whereas also the said is much shorter than that which is above in italicks; after stating the granting of the administration as above, the declaration would now be in this

"*Alexander afterwards, as such administrator as aforesaid, in our court before us at Westminster in the county of Middlesex, that is to say,*

TURNER v.
DAVIES.

who brought an
action of trover
against the
plaintiff in K. B.

[138]

whereas the said *Edmund*, in his life-time, that is to say, on the 1st day of *July* in the 20th year of our reign, at the parish of *Barking* in the county of *Essex*, was possessed of 48*l.* in monies numbered as of his own proper monies, and being so thereof possessed the said *Edmund* afterwards, to wit, on the said day and year in the said bill mentioned, at *Barking* aforesaid, in the county aforesaid, died so possessed of the said monies; after whose death the said monies afterwards came into the proper hands and possession of the said *Edward* by finding, and that afterwards, to wit, on the 21st day of *July* in the 20th year aforesaid, administration of all and singular the goods and chattels, rights, and credits which were of the said *Edmund Spicer*, at *Barking* aforesaid in the county aforesaid, was in due manner committed by *Thomas Eston* doctor of law, surrogate lawfully appointed of the said *William Wells* doctor of divinity official of the archdeacon of the archdeaconry of *Colchester*, to the said *Alexander*, the principal creditor of the said *Edmund*, and that the said *Edward*, although he well knew that the said monies were the proper monies of the said *Edmund* in his life-time, and did of right belong and appertain to the said *Alexander* after the death of the said *Edmund* by reason of the administration aforesaid, yet contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *Alexander* of the monies aforesaid in that behalf (2), had not then delivered to the said *Alexander* the monies aforesaid, (although the said *Edward* afterwards, to wit, on the 1st day of *September* in the 20th year aforesaid at *Barking* aforesaid in the county aforesaid, was requested by the said *Alexander*) but the said *Edward* afterwards, to wit, on the said 1st day of *September* in the 20th year aforesaid at *Barking* aforesaid in the said county of *Essex*, had converted and disposed thereof to his own use and benefit, to the damage of the said *Alexander* of 50*l.* and thereupon he then brought suit, &c. And the said *Alexander* brought then there into our said court before us the letters of administration afore-

" in the term of *St. Michael* in the 20th
" year of our reign, by bill, without
" our writ, impleaded the said *Edward*
" *Turner* in a plea of trespass on the
" case for that whereas," &c. Co. Ent.
87. b.

(2) The usual way now is, in a declaration in trover, to state the granting

of the letters of administration in this place within a parenthesis thus, (" to
" which said *Alexander* administration
" of the goods and chattels, rights and
" credits, which were of the said *Ed-*
" *mund*, &c.") and not to state it *before*
the breach, as is done here.

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said, which testified the committing of the administration aforesaid in form aforesaid, the date whereof was the same day and year aforesaid. And it is further shewn to us in our court before us on the behalf of the said *Edward Turner*, that such proceedings were had in our said court upon the said bill so as aforesaid exhibited in our said court before us against the said *Edward Turner*, that afterwards, to wit, in the term of *Easter* in the 21st year of our reign, it was considered by our said court before us, the said court then being at *Westminster* aforesaid, that the said *Alexander* should recover against the said *Edward Turner* 51l. for his damages which he had sustained as well on occasion of the premises, as for his costs and charges by him about his suit in that behalf expended, as by the record thereof remaining in our said court before us at *Westminster* aforesaid more fully appears. And it is further shewn to us on the behalf of the said *Edward Turner*, that afterwards, that is to say, on the 21st day of *June* in the year of our Lord 1669, at *Westminster* aforesaid, before Sir *John Kelynge* knt. our chief justice assigned to hold pleas before us, Sir *William Wylde* knt. and bart. one of our justices of the bench, *Leoline Jenkins* doctor of law, judge or lieutenant of the high court of admiralty of *England*, Sir *Justinian Lewin*, and Sir *Walter Littleton*, knts. and doctors of laws, *John Mills*, *Edward Alderne*, *Timothy Baldwin*, and *Richard Lloyd*, doctors of law, judges rightly and lawfully delegated and appointed by our commission under our great seal of *England*, the merits and circumstances of certain principal causes of revocation of a grant of letters of administration of the goods, rights, and credits of the said *Edmund Spicer*, being heard, seen and understood, and fully and maturely discussed by virtue of an appeal in that behalf devolved, which was agitated and depending undecided before them in judgment, by virtue of a commission of appeal under our great seal of *England*, between the said *Alexander Davies* party appellant and complainant of the one part, and one *John Spicer*, natural and lawful brother on the side of the father of the said deceased, party appellant and complainant of the other part, the said judges delegates rightfully and lawfully proceeding the parties aforesaid lawfully appearing by their proctors before the said judges delegates in judgment; the party of the said *John Spicer*, that sentence should be given and justice done for his party, but the party of the said *Alexander Davies* sentence also for his party pre-

And recovered
judgment for
51l.

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sent respectively demanding and praying; the said judges delegates, having the whole and entire process in such case before them, proceeded to the definitive sentence of them the said judges delegates in manner and form following, that is to say, that because to the said judges delegates, inasmuch as from the things done, enacted, deducted, proposed, alleged, and proved in such case, it appeared clearly found on the part of the said *John Spicer*, that his intention in a certain allegation made among the acts of the judge from whom in that behalf it was appealed in the first instance of the cause, and in the proceedings of the said judge, to the said judges delegates as aforesaid in that behalf transmitted, mentioned, and in the same cause exhibited, was sufficiently and fully founded and proved, and that nothing effectual to the contrary on the part of the said *Alexander Davies* in that behalf was deduced, excepted, proposed, alleged, or proved, which should elude or in any manner weaken the intention of the said *John Spicer* in that behalf; therefore the judges delegates as aforesaid, having first called on the name of Christ, and putting and having God alone before their eyes, by and with the advice of the learned in the law, with whom in this behalf they communicated, and maturely deliberated, did pronounce, decree, and declare, that the said *John Spicer* was and is, in the common reputation of men, the natural and lawful brother of the said *Edmund Spicer*, deceased, of whose rights and credits it was in that cause debated, and for the interest of the said *John Spicer*, and pronounced and declared that it was rightfully and lawfully proceeded in, pronounced, decreed and revoked by *Lewis Griffin* clerk, surrogate of the venerable *Thomas Exton* aforesaid doctor of law official in and throughout the whole archdeaconry of *Colchester*, judge in the first instance of the cause, and also pronounced and declared that the letters of administration of the goods, rights, and credits of the said *Edmund Spicer* deceased, theretofore granted to the said *Alexander Davies* by the judge, from whom there was an appeal in this behalf in the first instance of the said cause, were in fact badly and unjustly, and against the order of law, granted to the said *Alexander Davies*, and pronounced, decreed, and declared, that letters of administration of the goods, rights, and credits of the said deceased should, and of right ought under proper security, to be committed to the said *John Spicer*, and accordingly they committed the same to the said *John Spicer*, sworn in due form of law, and rati-

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Administration
to the defendant
was afterwards
repealed, and
granted to J. S.;

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fied and confirmed the interlocutory decree theretofore made and interposed of revocation of the letters of administration of the goods, rights, and credits of the said deceased, theretofore granted to the said *Alexander Davies* by the said judge, from whom there was in that behalf an appeal in the first instance of the said cause, theretofore made and interposed, as by the definitive sentence of the said judges delegates more fully appears. By virtue of which said premises, the said judgment so as aforesaid given, for the said *Alexander Davies*, as administrator of the goods and chattels, rights, and credits of the said *Edmund Spicer*, against the said *Edward Turner*, in our said court before us ought to be void, and of no force in law against the said *Edward*. And although by reason of the premises the said *Edward Turner* is become, and is by the law of the land chargeable to the said *John Spicer* of and for the said 48*l.* in monies numbered, and for that reason of right is discharged, and ought to be discharged from every execution whatsoever for the said damages, costs and charges by reason of the said judgment had or prosecuted against him at the suit of the said *Alexander*, as the said *Edward Turner* by ways and means convenient is ready to verify. Nevertheless the said *Alexander Davies*, not considering the aforesaid premises, but contriving very much to aggrieve the said *Edward Turner* in this behalf, has now lately sued out execution thereupon against the said *Edward Turner*, and unjustly endeavours, and daily threatens, under colour and pretence thereof, to take and arrest the said *Edward Turner* by his body in execution for the damages aforesaid, to the manifest damage, prejudice, and grievance of the said *Edward Turner*, and against the law and custom of our realm of *England*; whereupon the said *Edward Turner* besought us of a fit remedy to be provided for him in this behalf, and we being unwilling that the said *Edward Turner* should be in any wise injured, and being willing that what is just should be done in this behalf, do command you that having heard the complaint of the said *Edward Turner* in this behalf, and having called before you the said parties, and others whom you shall think meet to call in this behalf, and having hence heard thereupon their reasons, you cause full and speedy justice to be done to the parties aforesaid, as according to law and the custom of our realm of *England* you shall think fit and just to be done. Witness ourself at *Westminster* the 27th day of *November* in the 21st year of our reign. Afterwards, to wit, on *Monday*

by reason thereof the judgment by defendant against plaintiff is void.

Breach that the defendant has taken out execution against the plaintiff, and threatens to arrest him.

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Declaration
same with the
writ *mutatis*
mutandis.

next after 15 days of *St. Martin* in this same term, before our lord the king at *Westminster*, came the said *Edward Turner* by *Edward Coleman* his attorney, and immediately said, that whereas the said *Edmund Spicer* heretofore, to wit, on the 1st day of *July* in the 20th year of the reign of our said lord the now king, at *London* aforesaid died intestate, after whose death, to wit, on the 21st day of *July* in the aforesaid 20th year of the reign of our said lord the now king, at *London* aforesaid, administration of all the goods and chattels which were of the said *Edmund Spicer* at the time of his death, was committed by *Thomas Exton* doctor of law, surrogate lawfully appointed of the venerable *William Wells* doctor of divinity official of the archdeacon of the archdeaconry of *Colchester*, to one *Alexander Davies* as principal creditor of the said *Edmund*, and that by virtue of the said administration to the said *Alexander Davies* so as aforesaid committed, the said *Alexander Davies*, as administrator of the goods and chattels of the said *Edmund Spicer* afterwards, that is to say, in the term of *St. Michael* in the aforesaid 20th year of the reign of our said lord the now king, came into the court of our said lord the king before the king himself at *Westminster* in the county of *Middlesex*, by *Richard Somer* then his attorney, and brought then there into the said court his certain bill against the said *Edward Turner* in the custody of the marshal, &c. of a plea of trespass upon the case, and there were pledges of prosecution, to wit, *John Doe*, and *Richard Roe*, by which said bill, the said *Alexander Davies*, as administrator of all and singular the goods and chattels aforesaid, by the name of *Alexander Davies*, administrator of all and singular the goods and chattels, rights, and credits, which were of the said *Edmund Spicer*, complained of the said *Edward Turner*, then being in the custody of the marshal of the marshalsea of our said lord the king before the king himself, for this, to wit, that * whereas the said *Edmund* in his life-time, that is to say, on the 1st day of *July* in the 20th year of the reign of our said lord the now king at the parish of *Barking* in the county of *Essex*, was possessed of 48*l.* in monies numbered as of his own proper monies, and being so thereof possessed the said *Edmund* afterwards, to wit, on the day and year in the said bill above-mentioned at *Barking* aforesaid in the county aforesaid, died so possessed of the said monies, after the death of which said *Edmund* the said monies afterwards came into the hands and possession of the said *Edward*

* See p. 137.
n to (1).

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by finding, and that, afterwards, to wit, on the 21st day of *July* in the 20th year aforesaid, administration of all and singular the goods and chattels, rights, and credits, which were of the said *Edmund Spicer*, at *Barking* aforesaid in the county aforesaid, was in due manner committed by the aforesaid *Thomas Exton* doctor of law, surrogate of the said venerable *William Wells* doctor of divinity, official of the archdeacon of the archdeaconry of *Colchester*, to the said *Alexander* principal creditor of the said *Edmund*, and that the said *Edward*, although he well knew that the said monies were the proper monies of the said *Edmund* in his life-time, and of right did belong and appertain to the said *Alexander* after the death of the said *Edmund* by reason of the administration aforesaid, yet contriving and fraudulently intending craftily and subtly to deceive and defraud the said *Alexander* of the monies aforesaid in that behalf *, had not then delivered to the said *Alexander* the monies aforesaid, (although the said *Edward* afterwards, to wit, on the 1st day of *September* in the 20th year aforesaid, at *Barking* aforesaid, in the county aforesaid, was requested by the said *Alexander*,) but that the said *Edward* afterwards, to wit, on the said 1st day of *September* in the 20th year aforesaid at *Barking* aforesaid in the county of *Essex* aforesaid, had converted and disposed thereof to his own use and benefit, to the damage of the said *Alexander* of 50*l.* and thereupon he then brought suit, &c. And the said *Alexander* brought then there into the said court of our said lord the king before the king himself the letters of administration aforesaid, which testified the committing of the administration aforesaid, in form aforesaid, the date whereof was the same day and year aforesaid. And whereas also such proceedings were had in the said court of our said lord the king before the king himself upon the said bill so as aforesaid exhibited against the said *Edward Turner*, in the said court of our said lord the king before the king himself, that afterwards, to wit, in the term of *Easter* in the 21st year of the reign of our said lord the now king, it was considered by the said court of our said lord the king before the king himself, the said court then being at *Westminster* aforesaid, that the said *Alexander* should recover against the said *Edward Turner* 51*l.* for his damages, which he had sustained as well on occasion of the premises, as for his costs and charges by him about his suit in that behalf expended, as by the record thereof remaining in the court of our said lord the king be-

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* See p. 138.
note (2).

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fore the king himself at *Westminster* aforesaid, more fully appears. And whereas also afterwards, to wit, on the 21st day of *June* in the year of our Lord 1669 at *Westminster* aforesaid, before Sir *John Kelynge* knt. chief justice of our said lord the king assigned to hold pleas before the king himself, Sir *William Wylde* knt. and bart. one of the justices of our said lord the king of the bench, *Leoline Jenkins* doctor of law, judge or lieutenant of the high court of admiralty of *England*, Sir *Justinian Lewin*, and Sir *Walter Littleton*, knts. and doctors of law, *John Mills*, *Edward Alderne*, *Timothy Baldwin*, and *Richard Lloyd*, doctors of law, judges rightly and lawfully delegated and appointed by a commission under our said lord the king's great seal of *England*, the merits and circumstances of a certain principal cause of revocation of a grant of letters of administration of the goods, rights and credits of the said *Edmund Spicer*, been heard, seen, and understood, and fully and maturely discussed by virtue of an appeal in that behalf devolved, which was agitated and depending undecided before them in judgment, by virtue of a commission of appeal under our said lord the king's great seal of *England*, between the said *Alexander Davies*, party appellant and complainant of the one part, and one *John Spicer*, natural and lawful brother on the side of the father of the said deceased, party appellant and complainant of the other part, the said judges delegates rightfully and lawfully proceeding, the parties aforesaid lawfully appearing by their proctors before the said judges delegates in judgment, the party of the said *John Spicer*, that sentence should be given and justice done for his party, but the party of the said *Alexander Davies*, sentence also for his party present, respectively demanding and praying; the said judges delegates having the whole and entire process in such case before them, proceeded to the definitive sentence of them the said judges delegates in manner and form following, that is to say, that because to the said judges delegates, inasmuch as from the things done, enacted, deducted, proposed, alleged and proved in such case, it appeared clearly found on the party of the said *John Spicer*, that his intention, in a certain allegation made among the acts of the judge from whom in that behalf it was appealed in the first instance of the cause, and in the proceedings of the said judge in that behalf transmitted, mentioned, and in the same cause exhibited to the said judges delegates as aforesaid, was sufficiently, and fully founded and proved, and

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that nothing effectual to the contrary on the part of the said *Alexander Davies* in that behalf was deduced, excepted, proposed, alleged, or proved, which should elude, or in any manner weaken, the intention of the said *John Spicer* in that behalf, therefore the judges delegates as aforesaid, having first called on the name of Christ, and putting and having God alone before their eyes, by and with the advice of the learned in the law, with whom in this behalf they communicated, and maturely deliberated, did pronounce, decree, and declare, that the said *John Spicer* was and is, in the common reputation of men, the natural and lawful brother of the said *Edmund Spicer* deceased, of whose rights and credits it was in that cause debated, and for the interest of the said *John Spicer* and pronounced and declared that it was rightfully, and lawfully proceeded in, pronounced, decreed, and revoked by *Lewis Griffin* clerk, surrogate of the said venerable *Thomas Exton* doctor of law official in and throughout the whole archdeaconry of *Colchester*, judge in the first instance of the said cause, and also pronounced and declared that the letters of administration of the goods, rights, and credits of the said *Edmund Spicer* deceased, theretofore granted to the said *Alexander Davies* by the judge from whom there was an appeal in this behalf in the first instance of the said cause, were in fact badly, and unjustly, and against the order of law granted to the said *Alexander Davies*, and pronounced, decreed, and declared that letters of administration of the goods, rights, and credits of the said deceased should, and of right ought, under proper security to be committed to the said *John Spicer*, and accordingly they committed the same to the said *John Spicer* sworn in due form of law, and ratified and confirmed the interlocutory decree theretofore made and interposed of revocation of the letters of administration of the goods, rights, and credits of the said deceased, theretofore granted to the said *Alexander Davies* by the said judge from whom there was an appeal in that behalf in the first instance of the cause, as by the definitive sentence of the said judges delegates more fully appears. By virtue of which said premises the said judgment so as aforesaid given for the said *Alexander Davies*, as administrator of the goods and chattels, rights, and credits of the said *Edmund Spicer*, against the said *Edward Turner* in the said court of our said lord the king before the king himself, ought to be void, and of no force in law against the said *Edward*. And although by reason of the premises the said *Edward* be-

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came and is by the law of the land chargeable to the said *John Spicer* of and for the said 48*l.* in monies numbered, and for that reason is discharged, and ought to be discharged from every execution whatsoever for the said damages, costs, and charges by reason of the said judgment had or prosecuted against him at the suit of the said *Alexander*, as the said *Edward Turner* by ways and means convenient is ready to verify. Nevertheless the said *Alexander Davies*, not considering the aforesaid premises, but contriving very much to aggrieve the said *Edward Turner* in this behalf, has now lately sued out execution thereupon against the said *Edward Turner*, and unjustly endeavours, and daily threatens, under colour and pretence thereof, to take and arrest the said *Edward Turner* by his body in execution for the damages aforesaid, to the manifest damage, prejudice, and grievance of the said *Edward Turner*, and against the law and custom of this realm of *England*; and this the said *Edward* is ready to verify; wherefore he prays judgment, and that the said *Alexander Davies* may be barred from having any execution whatsoever of and upon the said judgment so as aforesaid recovered against him the said *Edward Turner*, and that he may be restored to all things which he has lost by occasion of the judgment aforesaid, &c. and that the said *Alexander* should come here into court to answer of and upon the premises, &c. But because it is unknown to the court of our said lord the king now here whether the allegations of the said *Edward Turner* in this behalf are true or not, therefore the sheriff of *Essex* is commanded that he should cause the said *Alexander* to come before our said lord the king from the day of *Easter* in three weeks, wheresoever he shall then be in *England*, to answer of and upon the premises, and further to do and receive what the court of our said lord the king now here before the king himself shall consider in this behalf, the same day is given to the said *Edward Turner*, &c. At which day before our lord the king at *Westminster*, comes the said *Edward Turner* in his proper person, and offers himself against the said *Alexander* in the plea aforesaid.

Plea

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And the said *Alexander Davies* being solemnly called comes by *Richard Somer* his attorney, and says that he, by any thing by the said *Edward Turner* above alleged, ought not to be barred from having his execution of and upon the said judgment, because, protesting that the said judgment given in the said court for the said *Alexander* ought not to be

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void, and of no force in law against the said *Edward*; protesting also that the said *Edward Turner* is not become chargeable to the said *John Spicer* of and for the said 48^l; for plea says, that well and true it is, that the said *Edmund Spicer* in the said writ named died intestate, and that after his death administration of all the goods and chattels which were of the said *Edmund Spicer* at the time of his death was lawfully committed to the said *Alexander Davies* as principal creditor of the said *Edmund* by the said *Thomas Exton* doctor of law, surrogate lawfully appointed, and having lawful authority and right in that behalf, of the venerable *William Wells* doctor of divinity official of the archdeaconry of *Colchester*; and the said *Alexander* further says, that before any revocation or repeal of the said letters of administration, and before any appeal from the committing of the said administration to the said *Alexander* was brought, made or prosecuted, that is to say, on the said 21st day of *September* in the said bill of the said *Alexander* specified, the said *Edward* at *Barking* aforesaid converted and disposed of the said goods and chattels in the said bill specified to his own use and benefit, wherefore the said *Alexander* afterwards and before any revocation or repeal of the said letters of administration, and before any appeal from the committing of the said administration to the said *Alexander* was brought, made, or prosecuted, that is to say, in the said term of *St. Michael* in the aforesaid 20th year of the reign of our said lord the now king, brought into the court of our said lord the king in the said court before the king himself his said bill against the said *Edward Turner* in manner and form as the said *Edward Turner* has above alleged; and that afterwards and before any revocation or repeal of the said letters of administration, and before any appeal was brought or prosecuted from the committing of the administration aforesaid, such proceedings were had upon the said bill of the said *Alexander*, that the said *Alexander* in the said term of *Easter*, in the 21st year of the reign of our lord the now king, by the consideration of the said court recovered against the said *Edward* the said 51^l. for his damages which the said *Alexander* had sustained as well on occasion of the premises, as for his costs and charges by him about his suit in that behalf expended, as by the said record thereof remaining in the said court of our lord the king before the king himself at *Westminster* more fully and at large appears. And the said

admits that administration of the effects of E. S. was granted to the defendant;

but the defendant says, that before the administration was repealed, and before any appeal for that purpose, the defendant obtained the said judgment against the plaintiff in the said action of trover.

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Alexander further says, that he the said *Alexander*, after the committing of the said administration to the said *Alexander*, and after the conversion of the goods and chattels aforesaid by the said *Edward Turner*, to wit, on the 21st day of *August* in the aforesaid 20th year of the reign of our said lord the now king at *Barking* aforesaid, was cited by a certain process of citation sued out at the promotion of *John Spicer* natural brother of the said *Edmund Spicer*, to appear before the said venerable *Thomas Exton* official aforesaid, in the parish church of *St. Peter* in the town of *Colchester*, in a judicial plea there on the 29th day of the said month of *August*, to exhibit and produce the said letters of administration of the goods, rights, and credits of the said *Edmund Spicer* deceased, or otherwise shew reasonable cause, if any be had, or could allege, why the said letters of administration should not be quashed, revoked, and annulled, and also why letters of administration of the goods, rights, and credits of the said deceased, should not be granted to the said *John Spicer*; at which day and place, the said *Alexander* by *Godfrey Lee* notary public, and his proctor, appearing before *Lewis Griffin* clerk surrogate of the said official, the said surrogate revoked the said letters of administration of the goods, rights, and credits of the said *Edmund Spicer* as aforesaid granted to the said *Alexander*, the said *Alexander* dissenting and then and there appealing to the court of *Canterbury* of the arches *London*, and lord official thereof, and praying to be given to him, &c. and a competent term to be assigned to prosecute the said appeal, and to certify the prosecution thereof; which said appeal from the revocation of the said letters of administration to the said *Alexander* he the said *Alexander* in due manner prosecuted in the said court of *Canterbury* of the arches aforesaid *London*, before *Sir Giles Sweet* principal official of the said court lawfully constituted, until the 20th day of *January* in the 20th year of the reign of our said lord now king of *England*, &c. on which day he the said *Alexander* conceiving that he was grievously hurt by certain grievances, nullities, unjust and injurious things decided against him, by the said *Sir Giles Sweet* principal official of the said court of *Canterbury* of the arches *London*, in the said cause of appeal depending before him in judgment between the said *Alexander Davies* appellant of the one part, and the said *John Spicer* appellant and complainant of the other part, and that he might by future enormities be unjustly prejudiced and ag-

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grieved, rightfully and lawfully appealed from the same, and every of them, and especially from the revocation of the letters of administration of the goods, rights, and credits of the said *Edmund Spicer*, granted by a judge competent in that behalf, to our said lord the king in his court of chancery, the said court then being at *Westminster* aforesaid, and that afterwards and after the said judgment by the said *Alexander* in form aforesaid had against the said *Edward Turner*, to wit, on the said 21st day of *June* in the aforesaid year of our Lord 1669, and not before, until which day the said appeal and cause of appeal of the said *Alexander* last mentioned was depending, undetermined, and undecided before the said judge, by the commission of our said lord the king under the great seal of *England* in that behalf rightfully and lawfully delegated and constituted, the said judges so as aforesaid delegated, pronounced, and declared that process was well, rightfully, and lawfully pronounced, decreed, and revoked by the said *Lewis Griffin* clerk, surrogate of the said *Thomas Exton* official in and throughout the whole archdeaconry of *Colchester*, judge in the first instance of the said cause, and also pronounced and declared that the letters of administration of the goods, rights, and credits of the said *Edmund Spicer* deceased, heretofore granted to the said *Alexander Davies*, were granted badly and unjustly, and against the order of law to the said *Alexander Davies*, and pronounced, decreed, and declared that letters of administration of the goods, rights, and credits of the said deceased should and of right ought to be committed to the said *John Spicer*, and committed the same to the said *John Spicer*, and ratified and confirmed the interlocutory decree of revocation of the letters of administration of the goods, rights, and credits of the said deceased granted to the said *Alexander*, as the said *Edward* has above alleged. And this he is ready to verify: wherefore inasmuch as the said letters of administration, granted as aforesaid to the said *Alexander* were and continued in their full force and effect at the time of giving the said judgment for the said *Alexander* against the said *Edward Turner*, the said *Alexander* prays judgment, and that the recovery aforesaid may stand in full force and effect, &c.

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And the said *Edward Turner* says that the said plea by the said *Alexander Davies* above pleaded in bar, and the matter in the same contained, are not sufficient in law to bar him the said *Edward* from vacating and avoiding execution upon Demurrer.

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the said judgment, to which said plea the said *Edward* has no necessity, nor is bound by the law of the land in anywise to answer. And this he is ready to verify; wherefore for want of a sufficient plea in this behalf, the said *Edward*, as before prays judgment, and that the said *Alexander Davies* may be barred from having any execution whatsoever of and upon the said judgment so recovered, and that he the said *Edward* may be restored to all things which he has lost by occasion of the said judgment, &c.

Joinder in demurrer.

And the said *Alexander*, since he has above alleged sufficient matter in his aforesaid plea to bar the said *Edward* from vacating and avoiding execution upon the said judgment, which he is ready to verify, which said matter the said *Edward* does not deny, nor does in anywise answer the same, but altogether refuses to admit that verification, as before, prays judgment, and that the said recovery shall stand in its full force and effect. And because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid before our lord the king until 15 days of the *Holy Trinity* wheresoever, &c. to hear their judgment thereupon, because the court of our lord the king here is thereof not yet, &c. At which day before our lord the king at *Westminster* come the parties aforesaid by their attornies aforesaid, whereupon all and singular the premises being seen, and by the court of our lord the king now here more fully understood, and mature deliberation thereupon had, for that it appears to the court of our lord the king here that the said plea by the said *Alexander Davies* above pleaded in bar, and the matter in the same contained, are not sufficient in law to bar the said *Edward* from vacating and avoiding execution upon the said judgment, it is considered that the said *Alexander Davies* have no execution against the said *Edward Turner*, or against any lands, tenements, goods, or chattels of the said *Edward* by reason of the said judgment, and that he the said *Edward* be restored to all things which he has lost by occasion of the said judgment, &c. (1)

Curia advisare vult.

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(1) An *audita querela* is an equitable action which lies for a person who either is in execution, or in danger of being so, upon a judgment, statute-merchant, statute-staple, or recognisance, when he has matter to shew that such execu-

tion ought not to have issued, or should not issue, against him; and is of a most remedial nature, and seems to have been invented, lest in any case there would be an oppressive defect of justice, where the party has a good de-

fence, but had not, nor has any other means to take advantage of it. Com. Dig. *Auditâ Querelâ* (A.) 3 Black. Com. 405. As if B. be taken in execution upon the statute acknowledged by A. in his name. F. N. B. 233. A. 7th edit. Or, where execution is sued out upon a statute taken without authority, or not duly sealed. Cro. Eliz. 233. *Ascue v. Fuljambe*. So if, upon a joint and several bond, one of the obligors is sued in the K. B. and taken in execution, and the other in the C. B., and his lands are taken in execution by *elegit*, as they may well be, an *auditâ querelâ* lies for him who is taken in execution; and because the judgment must be, that he be discharged from the execution, he cannot be taken again, though the land taken in execution should be evicted. Hob. 2. *Anon*. 2 Bulst. 97. *Cowley v. Lydeot*. So if the defendant has paid and satisfied the judgment, and is afterwards taken in execution, he may be relieved by *auditâ querelâ*, though he has no writing for the payment. Cro. Jac. 29. *Ognel v. Randol*, by three judges against *Popham*. So if there is judgment against two, who are both in execution, and the sheriff suffers one to escape, and the plaintiff recovers against the sheriff, and has satisfaction, the other shall be discharged by an *auditâ querelâ*. 2 Mod. 49. *Alford v. Tatnel*. 1 Mod. 170. S. C. So if a man be, as is already noticed, only in danger of being taken in execution, an *auditâ querelâ* lies, *quia timet*. Co. Litt. 100. a. and therefore the conusor of a statute, or a defendant against whom a judgment has been obtained, may have it before execution sued. 1 Roll. Abr. 306. (B.) pl. 6. And so may the heir of the conusor, Ibid. pl. 7. and the conusor or his heir may have an *auditâ querelâ* before any suit is commenced upon the statute. Ibid. pl. 8. And if there is a verdict

for plaintiff at Ni. Pri., and afterwards, and before the day in bank, he releases the defendant, and afterwards signs judgment, as the defendant cannot plead the release, he may have an *auditâ querelâ* to hinder the execution of the judgment. Gilb. C. B. 103. 3d edit. But it is said that he shall not have an *auditâ querelâ* until there be judgment against him, for perhaps the plaintiff never will enter up his judgment. 1 Roll. Abr. 306. (B) pl. 10. However, though it cannot be brought before judgment entered, yet as it may be out of the defendant's power to bring an *auditâ querelâ* before he is taken in execution, inasmuch as the plaintiff may get judgment signed, and take out execution on a sudden, and behind the defendant's back, therefore it was said by *Hale C. J.* that if an *auditâ querelâ* be brought after the day in bank, though the judgment be not entered up the court will make the plaintiff enter his judgment *as of the day in bank*; so that he shall not plead "*nul tiel record*." 1 Mod. 111. *Lampiere v. Mereday*.

And if there is judgment against A. in the common pleas, and against B. and C. in the king's bench for the same trespass, and A. satisfies the judgment against him, and satisfaction is acknowledged, and afterwards execution is sued out against B. he may have an *auditâ querelâ*; for though the plaintiff has a right to bring several actions for the same trespass, and recover in them all, yet when judgment and satisfaction is had against one, the plaintiff cannot have another satisfaction, any more than when an obligee sues one of two obligors in a joint and several bond in the common pleas and recovers, and afterwards sues the other in the king's bench and recovers, if one of them makes satisfaction, the other shall have an *auditâ querelâ* to avoid execution

against him, for the plaintiff can only have one satisfaction. And in this case C. may join in the *audita querela*, though he is not yet aggrieved, for he is privy to the judgment against B. Sir W. Jones, 377, 378. *Corbet v. Barnes*. Cro. Car. 443. S. C.

An *audita querela* is a commission to the judges to examine the cause. Cro. Jac. 29. *Ognell v. Randol*, and is in nature of a trespass; therefore where it was brought against two executors and one only appeared, and the other made default, he who appeared was awarded to answer alone: and damages are given if the execution be without right. 2 H. 4. 17. b. Bro. Damages, 38. Executors, 42. And it is said that it commenced only in the 10th year of Edward III. Sir T. Raym. 89. *Young v. Collet*. And it does not lie where there is any other remedy at law either by plea, or otherwise. Ibid. And therefore where the party had time to take advantage of the matter which he has in discharge of himself, and neglected it, he cannot afterwards be relieved by *audita querela*. 1 Roll. Abr. 306. (C) pl. 1. As where the plaintiff having obtained judgment against the defendant releases it, and afterward brings a *scire facias* upon the judgment, the sheriff returns *scire feci*, the defendant does not appear, and there is a judgment upon it, he cannot have an *audita querela*, for he had time to plead the release upon the return of the *scire facias*, and having neglected it, the law will not relieve him; and if in truth he was not warned he has his remedy against the sheriff for a false return; but it is otherwise if *nil* be returned on the *scire facias*. 1 Roll. Abr. 306. (C) pl. 4. Hob. 283. *Hannor v. Mase*, F. N. B. 237. J. 7th edit.

Finch Law, 488, 489. Sir T. Raym. 19. *Day v. Guildford*. 1 Salk. 264. *Wicket v. Creamer*. 1 Ld. Raym. 439. S. C. 1 Wils. 98. *Cooke v. Berry*. So if on a *scire facias* on a recognisance the party is returned warned, and makes default, he cannot avoid it by *audita querela*, upon the ground that the recognisance was upon condition, which he has performed, or other matter, because he had a day to answer it. 1 Roll. Abr. 336. (C.) pl. 2. 1 Salk. 264. *Wicket v. Creamer*. Moor, 536. *Very v. Carew*. No person is entitled to have an *audita querela*, who is not the party grieved. Sir W. Jones, 90. *Blakeston v. Martyn*. So an *audita querela* does not lie, where the matter alleged does not discharge the party; as where two persons are bound jointly and severally in a bond, and one of them is sued and taken in execution, and afterwards the other is sued and taken in execution, and then one dies, or escapes, the other is not entitled to an *audita querela*, for the death or escape of one is no discharge to the other. 5 Rep. 86 b. *Blumfield's case*. Co. Ent. 87. a.

However in general the courts will not put the defendant to the trouble and expence of an *audita querela*, but will relieve him in a summary way on motion. 4 Burr. 2287, *Sutton v. Bishop*; but where the ground of his relief is a release, when there is some doubt about the execution, or some matter of fact which cannot be clearly ascertained by affidavit, and therefore proper to be tried, the court has driven the defendant to his *audita querela*. 1 Salk. 264. *Wicket v. Creamer*. 1 Ld. Raym. 439. 12 Mod. 240. S. C. 1 Salk. 93. *Anon*. 2 Ld. Raym. 1295. *Ludlow v. Lennard*. 2 Str. 1198. *Mitford v. Cordwell*. S. P. [a]

[a] See also 5 Taunt. 561. *Nathan v. Giles*. 2 Marsh 37. *Dalby and Hewes v. Mott*.

And indeed the indulgence which of late has been shewn by courts of law in granting a summary relief upon motion in most cases of evident oppression, for which the only remedy formerly was by *audita querela*, has occasioned this remedy now to be seldom resorted to. It is however sometimes adopted at present. An *audita querela* was brought in the king's bench by Lord Portchester against Petrie, which was decided in Trin. 23 Geo. 3.; the case was this:

The writ set out the record in an action by Petrie against Lord Portchester for bribery; the declaration in that action stated that, on the 2d day of September, 20 Geo. 3., a writ issued to the sheriff of Wilts, to elect knights, and citizens and burgesses for the county, and cities and boroughs within it; that on the 5th of September the sheriff issued his precept for an election of two burgesses for the borough of Cricklade, and on the 11th the election was had, when Benfield, Macpherson, and Petrie were candidates, and that Macpherson was the friend of Lord Portchester; and that Lord Portchester bribed one Thomas Mann Gunn a voter, to give his vote for his friend, whereby and by force of the statute, an action had accrued to the said Petrie to demand, and have of and from the said Ld. P. and for his said offence 500*l.* parcel, &c. Then followed 99 other counts for bribery by Ld. P., or his agent Bristow, of 50 different persons, all laid on the 11th September; the issue was of Easter term, and the venire was awarded and continued as usual, and the trial was at Salisbury, 28th July 1781, and a verdict was found for Petrie upon four counts, after which was stated the judgment given for Petrie for 2000*l.* (the amount of four penalties,) and 142*l.* costs, which was on Tuesday next after the morrow of All-Souls. The *audita querela* then stated

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that before the said election, to wit, on the 11th of September, one W. Hinton did corruptly ask the said Lord Portchester to give him the sum of five guineas to vote for Macpherson; that after committing the said offence by W. Hinton, and after the committing of the said several offences by the said Ld. P. and within 12 months next after the said election, to wit, on the 29th May 1781, Ld. P. discovered to one Richards the offence of the said W. Hinton, to the intent that Richards might prosecute Hinton to conviction, he the said Ld. P. not having been then convicted of any offence against the said statute; that in Trinity term 21 Geo. 3. Richards impleaded Hinton in K. B.: then followed the declaration against Hinton, containing four counts for bribery on the 11th of September, the venire, postea, verdict for Richards on one count for 500*l.*, the judgment, which, like the judgment in the said action by Petrie against Lord Portchester, was on Tuesday next after the morrow of All Souls; that the said judgment continued in force, and which said offence whereof the said W. Hinton was convicted was the same offence which Ld. P. had so discovered to Richards; "and although the defendant, by reason of the said discovery and conviction, is and ought to be indemnified and discharged from the said penalties and costs so recovered against him by Petrie, and the disability upon the said judgment, nevertheless the said Petrie unjustly threatens to sue out execution." The record then further stated that Ld. P. prayed a writ of supersedeas to the sheriff of Wilts, to cease from all manner of execution upon the said judgment against him until the court shall give judgment upon the *audita querela*, and it was granted. And he also prayed process against Petrie, which

F f

was granted, and stated *Petrie's* appearance. Then *Ld. P.* declared on the *audita querela*, which, as usual, was only a repetition of the writ, and concluded with praying judgment, and that *Petrie* might be barred from having any execution whatsoever of the said judgment, and that he the said *Ld. P.* might be restored to all things which he had lost by occasion of the said judgment.

The defendant *Petrie* pleaded that before the said election, to wit, on the 11th day of *September*, one *Hopkins* a voter corruptly received from *Bristow* the sum of five guineas to vote for *Macpherson*; that after the committing the said offence, and after the offence by *Hinton*, and before *Ld. P.* made the discovery to *Richards*, namely, on the 30th *September* 1780, *Hinton* discovered *Hopkins's* offence to *Petrie*, and that before *Ld. P.* made the discovery to *Richards*, namely, on the 21st of *May* 1781, *Petrie* sued out a *latitat* against *Hopkins*, and in *Trinity* term following declared against him. The plea then stated the proceedings in the action by *Petrie* against *Hopkins*, in which the *nisi prius* day was also on the 28th *July* 1781, and verdict for *Petrie* for one penalty, and judgment on *Tuesday* next after the morrow of *All-Souls*, 22 *Geo. 3.*, that the judgment remained in full force; and then *Petrie* averred "that the said judgment so given against *Hopkins* was in fact given before the judgment against *Hinton* in the action so commenced against him by *Richards*," whereby *Hinton* was indemnified. And in order to obtain such indemnity, *Hinton* on the 12th of *February*, 22. *Geo. 3.*, sued out a writ of *audita querela* against *Richards*, which was then depending, "and this the said *Petrie* is ready to verify." To this plea *Ld. P.* replied that the judgment against *Hinton* in the action against him by *Richards* was given before the judgment against *Hopkins*, and traversed

that the judgment against *Hopkins* was given before the judgment against *Hinton*, "and this he is ready to verify." The rejoinder took issue on the traverse, and concluded to the country. To the rejoinder *Ld. P.* demurred, and assigned for cause that "it appears from the proceedings in this cause that the said judgment against *Hopkins*, and the judgment against *Hinton*, were given at one and the same time, that is to say, on the same *Tuesday* next after the morrow of *All Souls*, and therefore the averment in the plea that the judgment against *Hopkins* was given before the judgment against *Hinton* is wholly inadmissible, or if the same were admissible, yet that the matter therein averred being matter of record, ought to have been verified by the record of the judgment, and to have been determined by the court here; whereas the said *Petrie* has endeavoured to put the same in issue to be tried by the country, and for that the said *Petrie* has not offered to verify his said plea, or the matter therein alleged, by the records of the judgment, or by any record whatever," &c. The defendant joined in demurrer, &c.

After this case had been twice argued, Lord *Mansfield* delivered the resolution of the court. He said that four points had been made in argument, three on the form of the pleadings, and the fourth on the statute 2 *Geo. 2. c. 24. s. 8.* which enacts, "that if any person offending against this act shall, within the space of twelve months next after such election as aforesaid, discover any other person or persons offending against this act, so that such person or persons so discovered be thereupon convicted, such person so discovering, and not having been before that time convicted of any offence against this act, shall be indem-

"nified, and discharged from all penalties and disabilities which he shall then have incurred by any offence against this act." The first question that had been made was, whether priority of judgment could be averred, when it was admitted on the record that both judgments were given on the same day. [b] 2. Whether the averment was to be tried by the country, or by the record. 3. Whether the plaintiff could demur after an issue taken on his own traverse; and 4. Whether, admitting a judgment obtained by a discoverer to be an indemnity, though of the same day with a judgment against him, a conviction of a person indemnified were an exemption within the statute.

As to the first, it was laid down in 2 Burr. 967. *Johnson v. Smith*, that judgments should be deemed complete, and bind to all purposes by relation. There was no authority to contradict that rule of common law; and Cro. Car. 102. *Standford v. Cooper*, was a very strong case in support of it. There was the same attempt in Latch. 53. * *Gerrard v. Norris*, to make a fraction of a day; and so in 8 Mod. 189. *Miller v. Bradley*. From the argument in that case it must in fact have been a judgment of the morrow of the *Holy Trinity*. The cases in 3 Keb. 496. 491. *Hutchins v. Thomas*. 2 Lev. 141. S.C. Cro. Eliz. 261. *Reg. v. Harris*. Hob. 128. *Pie v. Coke*. Moor. 864. S.C. 2 Hawk. 275. 2 Str. 1169. *Jackson v. Gisting*. 3 Burr. 1423. *Combe v. Pitt*, did not apply; for in them priority of judgment was not the question, but priority of suit, which is the act of the party, but the judgment is the act of the court. Another string of cases as little applicable were those of *Johnson v. Smith*, 2 Burr. 950. *Wood v.*

Newton, 1 Wils. 147. and *Foster v. Bonner*, Cowp. 454., for they all turned upon the question of what was the commencement of the suit. The application for the writ was an act of the party, and might be put in issue to be tried by the country.

But that rule was liable to two exceptions. One was, when the precise time of signing a judgment, or any other act of record, was made material by statute; as the enrolment of a bargain and sale, and judgments as they affect purchasers. *Hinde's case*, 4 Rep. 71., was determined on the statute 27 H. 8. c. 16., but the exceptions prove the rule. The other was by common law; as where there is a special memorandum of the bill having been filed on a particular day within the term, the judgment in that case will have relation only to the time of filing the bill. Yelv. 35. *Huyse v. Wright*. The first reason assigned in that case was misreported, and the second was the only one on which the judgment could be supported. It was admitted on the record in that case, that the judgment was after the 20th of May. So in 8 Mod. 189. *Miller v. Brndley*, and 3 Salk. 212. it was said by Holt C. J. that a judgment should relate to the first day of the term; unless there were a memorandum to the contrary, as where there was a continuance of the cause until another day in the same term. Therefore they were of opinion there could be no such averment. That made it unnecessary to decide the two next questions; though the same reasoning would go a good way to shew that the trial must be by the record.

The remaining question was on the statute as to the indemnity. That was quite new, and therefore to make it in-

[b] Where a sheriff enters under a *f. fa.* on the same day that an act of bankruptcy is committed, the priority

may be enquired into. 2 B. & A. 586. *Thomas v. Desanges*.

telligible he would state so much of the case as was applicable to that point, and the arguments that had been used.

Before Lord Porchester discovered *Hinton*, he (*Hinton*) discovered *Hopkins* and convicted him; *Hinton* sued out an *audita querela*, which was depending. It had been objected on the part of *Ld. P.*, that the *audita querela* by *Hinton* was still depending, and *non constat* that he would be exempted, and though the plea had stated the facts, the court ought not to decide on them, because *Hinton* was not a party to that record; but to that the right answer had been given by the defendant's counsel, that *Hinton's audita querela* was stated only to shew that he was suing his remedy, and not that suing an *audita querela* would be sufficient if the facts were not sufficient.

The other question was, Whether the court could decide on that record? There would be unequal justice if they could not; both parties were interested in it. Lord *P.* relied on the judgment against *Hinton* as his indemnity. *Petrie* must be entitled to shew it was not; he could bring no *audita querela*, nor contest it in any other way. All persons were entitled to contest the fairness of a judgment when it became material to them. Suppose *Hinton* had submitted, would that have barred *Petrie*?

It has also been objected on the part of Lord *P.*, that he was entitled although *Hinton* were indemnified. And it was said to be like the case of an indemnity on conviction, and the offender pardoned after conviction. But it did not apply; in criminal cases the verdict was the conviction, and where the offender was convicted, the party had performed the condition upon which the indemnity was offered, and the mercy of the crown could not devert his right; but then it must be a legal conviction, for if it were on an insufficient indictment, and judgment were arrested, and the offen-

der indicted on a new indictment, the accomplice was bound to appear on the second trial. So it must be a legal conviction on that statute. The question was no more than, whether a conviction to entitle to indemnity was such as might be followed up by punishment, or a mere form? The state of the case decided it. The case of an insufficient indictment, and the opinion of *Yates J.* in delivering the judgment of the court in 4 Burr. 2283. *Sutton v. Bishop*, were decisive. Here Lord *P.* had not substituted any other offender in his place. *Hinton* was not liable, and if Lord *P.* were indemnified, no example could be made.

It was said that Lord *P.*'s merit was the same, because he could not know of *Hinton's* indemnity. The answer was, whatever his intention might be, he had not done what was required, and it was the act, not the intention, which the statute applied to. For those reasons they were of opinion that there must be judgment for the defendant.

The process in *audita querela* is a *venire facias*, and *distringas*, *alias* and *pluries distringas*, and if *non est inventus* or *nihil* be returned, the plaintiff may have a *capias* against the defendant. F. N. B. 239, V. 7th edit. Dyer. 197. b. If the party be in execution, the process is a *scire facias*; but if not, a *venire facias*. Moor, 811. *Trot v. Spurling*. 1 Salk. 92. *Clerk v. Moor*. And if an *audita querela* is founded upon a record, the process upon it is a *scire facias*, in like manner as where the party is in execution; but if it be grounded on matter of fact, or the party is not in execution, the process is a *venire*. 1 Salk. 92. Anon. Where an *audita querela* is sued *quia timet*, and the party at large, there never shall be a *scire facias*, but the proper process is a *venire* and distress infinite. 1 Salk. 92. *Clerk v. Moor*.

An *auditd quereld* may be brought in the same court in which the record upon which it is founded remains, or returnable in the same court; and therefore if a man recovers judgment in the common pleas, or king's bench, and afterwards by deed releases it, and then sues out execution, the defendant may have an *auditd quereld* out of the common pleas or king's bench, where the record is; and yet he may have an *auditd quereld* out of chancery returnable in the common pleas or king's bench, and so it is sometimes judicial, and sometimes original. F. N. B. 239, 240. B. 7th edit.

An *auditd quereld* is no supersedeas; and therefore execution may be taken out, unless a supersedeas be sued forth; and if the *auditd quereld* be founded on a deed, it must be proved in court be-

fore a supersedeas shall be granted. 1 Salk. 92. *Langston v. Grant*. If the plaintiff be not in execution, there is no need of bail, for they are only necessary when a person in execution is to be discharged. Sir W. Jones, 378. *Corbet v. Barnes*. See the form of the bail-piece, 2 Sell. Prac. 254. And the writ shall not be allowed, nor shall there be any supersedeas thereupon unless the release upon which it is founded be proved by the witnesses present in court. 1 Sid. 351. *Nuby v. Jenkins*. [c] Where the defendant confesses the matter alleged, the plaintiff has judgment and discharge by confession; but if the defendant denies it, the parties proceed to issue in fact or in law, as in other cases. It is said that costs are not recoverable in this action. Dyer. 194. a.

[c] But an *auditd quereld* was lately brought in the case of *Nathan v. Giles*, 7 Taunt. 557. 1 Marsh. 226. S. C.; and it was there held that a writ of *auditd quereld* need not be moved for, but is a proceeding of common right and *ex debito justitiæ*. However the supersedeas founded thereon must be moved

for. If the plaintiff be nonsuited he may have a new *auditd quereld*, but he shall not have a supersedeas. Fitz. N. B. 104. O. 9th edition. In *Nathan v. Giles*, the court declared their opinion, that there can be no motion in arrest of judgment in an *auditd quereld*.

Turner versus Davies.

Case 25.

Pasch. 22 Car. II. Regis. Rot. 576.

AUDITA QUERELA by *Turner* against *Davies*; the plaintiff declares that one *Edmund Spicer* died intestate, and after his death administration of his goods was committed to the defendant as principal creditor, and the defendant as administrator, &c. afterwards recovered in this court against the now plaintiff 51*l.* for damages and costs in an action of trover for the conversion of certain monies of the intestate converted by the now plaintiff to his own use, and afterwards the administration of the now defendant upon an appeal to the delegates was repealed, and administration of the goods of the intestate was granted to one *John Spicer* the brother of the

S. C. 1 Mod. 62.
2 Keb. 668.
An *auditd quereld* lies to discharge a judgment obtained by an administrator, where, after the judgment, the administration is repealed.

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intestate, by reason whereof the now defendant ought not to have any execution on the judgment against the now plaintiff, because he is become chargeable to the said *John Spicer* as administrator, &c. for the monies converted by him, yet the now defendant intends and endeavours to take the now plaintiff in execution on the said judgment for the damages and costs aforesaid unjustly, and to the great damage of the now plaintiff, wherefore he brought this action.

The defendant appears and pleads in bar that he had recovered the said judgment before he was cited upon the appeal to repeal his letters of administration, as the plaintiff has alleged, upon which plea the plaintiff demurred in law.

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And it was argued by *Saunders* for the plaintiff, that the plea was insufficient to bar the plaintiff, because the plea contains no more than is comprised in the declaration, and he argued that here the writ and declaration were good; for it appears fully by the record that the judgment was by the defendant as administrator for a debt due to the intestate, that is, for the value of the goods of the intestate which were converted; and though there be now a judgment, and the damages, which were before uncertain, are now reduced to a certainty, yet before execution it is but a *chose in action*: for if the now defendant had died before his administration was repealed his executors or administrators could not sue out execution on this judgment, but before the statute 17 Car. 2. c. 8. the administrator *de bonis non* in all cases was obliged to commence a *new action*; but now by this act if the judgment is after verdict, the administrator *de bonis non*, &c. may sue out execution upon the judgment. But the executors or administrators of the now defendant, who has so recovered the judgment, have nothing to do with it; which proves that the now defendant was only entitled to the monies as administrator, and not otherwise. And now his administration being repealed, his title is determined, and he ought not any further to intermeddle with any of the estate of the intestate, for it now belongs to *John Spicer* the new administrator. And this is matter which the now plaintiff could not plead before in the action of trover against him, because it is subsequent matter which happened after the judgment, and therefore the plaintiff is now to be relieved by this action; and *Coke's Entries*, 89. a. and 8 Rep. 144 a. *Drury's case*, are full to this purpose; for the plaintiff in the *audita querelâ* in that case was in execution at the suit of an executor, and

In all cases before the statute 17 Car. 2. c. 8. administrator *de bonis non* was obliged to begin a new action, but now he may sue out execution on a judgment after verdict—See ante, 72. in the note. S. P.

afterwards the will was revoked by sentence in the spiritual court; whereupon the plaintiff brought his *audita querela*, and had judgment to be released out of prison. Therefore he prayed judgment for the plaintiff here.

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Barrel for the defendant argued, that here was a thing vested in the defendant which could not be divested by the repeal of the letters of administration; for if the money on the judgment had been paid, or levied by an execution, the defendant would retain them, notwithstanding the letters of administration were afterwards revoked, and the now plaintiff would be discharged against the now administrator. And although here the defendant has not received the money, yet by the judgment itself the property of the goods converted is altered, and the now plaintiff shall never be charged again for the conversion of them. And if it should be otherwise, and the new administrator should have an action *de novo* for the same conversion, perhaps it might be barred by the statute of limitations, and so that part of the intestate's estate would be altogether lost. And he strongly insisted that here was a duty vested in the now defendant as administrator, of a different nature from that which was in the intestate, and therefore it should not be divested by the repeal of the administration afterwards, but the now defendant shall have it notwithstanding the repeal of the administration; therefore he prayed the now plaintiff should be barred.

3 Term Rep.
125. Allen v.
Dundas.

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Sed non allocatur; for *Kelynge* C. J. said that the law abhors circuity of action (2); and here there will be a circuity of

The law abhors
circuity of action.

(2) If a man, upon the credit of B., lend money to A., which is applied to the use of A., but is not put to account by A., upon an account made between him and B., the lender shall have an account in chancery against A. for avoiding the circuity of action, if he was to be put to his action against B. and B. to an action against A. Ruled in chancery, and upon an appeal affirmed in the house of lords. *Show. Cas. Parl.* 17. So in covenant the plaintiff declared that the defendant had covenanted with him to collect his rents in C. and assigned a breach that the defendant did not collect them. The defendant pleaded that the

plaintiff himself had interrupted his collecting the same. It was insisted that the plea was not good; for if it was the defendant might bring trespass against the plaintiff, and recover damages, and therefore it was no plea to this action. But it was answered by the court that the plea was good in avoidance of circuity of action; for if the defendant should bring trespass and recover damages, then the plaintiff should have an action of covenant against the defendant, and recover, which circuity of action the law will not suffer. *Keilw.* 84. b. 35. a. So where a man becomes bound to another who covenants not to put the bond in

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action if the now defendant should sue out execution and receive the money. For it was clear, he said, that the new administrator would recover it again against the now defendant. And therefore to avoid circuity of action, the now plaintiff shall be discharged against the now defendant from the said judgment, and be chargeable to the new administrator for the value of the goods converted; wherefore it was adjudged for the plaintiff by the whole court.

suit before *Michaelmas*, and the obligee nevertheless brings debt on the bond before *Michaelmas*, the defendant cannot plead the covenant in bar, but must have recourse to an action upon it; but if the covenant had been *not to sue at all*, it is reasonable, in order to avoid circuity of action, to allow its being pleaded in bar of the action. And. 307. pl. 316. *Dowse v. Jeffries*. Cro. Eliz. 352. S. C. So where to debt on bond for 200*l.* the defendant pleaded, that, after the making of the bond, the plaintiff by indenture covenanted, that if the defendant should at such a day pay 100*l.* the obligation should be void, and alleged that he paid the money at the day; and upon demurrer it was insisted for the plaintiff, that the indenture being made after the bond, could not be pleaded in bar; but all the court held that the defendant might well plead it in bar, without being put to the action of covenant by circuity of action. Cro. Eliz. 623. *Hodges v. Smith*. So in debt for rent on a lease for years, the defendant pleaded in bar, that the lessor did covenant that the lessee might deduct so much for charges, and upon demurrer this was adjudged a good plea, it being a thing executory, and the covenant *in the same deed*, and the party should not be put to circuity of action, and to bring action of covenant. 1 Lev. 152. *Johnson v. Carre*. But it is otherwise where the covenant is in another deed, for the last deed does not take away the effect of the

former; and a subsequent covenant cannot be pleaded in bar of a former; but the defendant must bring his action upon the last indenture, if he will help himself. 2 Vent. 217, 218. *Gawden v. Draper*. So if A. and B. are jointly and severally bound to H., and H. covenants only with A. that he will not sue A., this is not a defeasance, for still there is a remedy on the bond against B.; but it is otherwise if A. only had been bound, for then such covenant excludes him from any remedy for ever, *to avoid circuity of action*. 2 Salk. 575. *Lacy v. Kynaston*. S. C. 1 Ld. Raym. 690. 12 Mod. 551. It is indeed a maxim in law so to judge of contracts, &c. as to prevent a multiplicity of actions; upon which grounds it is that courts do construe express words of covenant into a release. As supposing the obligee of a bond covenants not to sue on it, the courts say that shall operate as a *release*; for if it operated only as a covenant, it would produce two actions. 1 Term Rep. 446. *Smith v. Mapleback*.

But a cause of action against a plaintiff will be no bar to an action by him for avoiding circuity of action, when the recovery in both actions is *not equal*; as in waste it is no bar, that the plaintiff covenanted to repair, for in waste the plaintiff is entitled to recover *treble* damages, but the defendant in his action of covenant will only recover *single*. Moor, 23. pl. 80.; see ante, 48, in the note (1).

Benson *versus* Welby, late Sheriff of Lincoln. Case 26.

Trinity, 21 Car. II. Regis. Rot. 1505.

Yorkshire, } **BE** it remembered, that heretofore, to wit, in Same precedent.
1 Mod. Ent.
136.
to wit, } *Easter* term last past, before our lord the king
at *Westminster* came *Christopher Benson* by *John Stone* his attorney, and brought here into the court of our said lord the king then there his certain bill against *William Welby* esq. late sheriff of the county of *Lincoln*, in the custody of the marshal, &c. in a plea of trespass on the case, and there are pledges of prosecution, to wit *John Doe* and *Richard Roe*, which said bill follows in these words, to wit: *Yorkshire*, to wit, *Christopher Benson* complains of *William Welby* esq. late sheriff of the county of *Lincoln* being in the custody of the marshal of the marshalsea of our lord the king before the king himself, for this, to wit, that whereas one *John Wright* J. W. indebted
to the plaintiff
by a bill obligat-
tory. lately, that is to say, on the 1st day of *August* in the year of our Lord 1667 at the city of *York* in the said county, by his certain bill obligatory, sealed with his seal, bearing date the same day and year, acknowledged himself to owe, and be indebted, to the said *Christopher* in the just sum of 166*l.* of lawful money of *England*, which he undertook and promised to pay to the said *Christopher* at or upon the 2d day of *February* next following the date of the said bill, and to the payment whereof well and truly to be made bound himself, his heirs, executors, and administrators in the sum of 392*l.* of like money firmly by the said bill (1); which 166*l.* the said *John*

(1) It is necessary in this action to aver and prove that the plaintiff had a cause of action against the person who escaped. If it be not averred, the declaration is bad on demurrer; and if it be not proved as averred, the plaintiff will be nonsuited. 2 Lev. 85. *Gunter v. Cleyton*. 4 Term Rep. 611. *Alexander v. Macauley*. [a]

[a] 2 Esp. 477. n. *Parker v. Fenn*. So where the declaration in an action for an escape states generally that the party was indebted to the plaintiff for goods sold and delivered, if it should appear at the trial that the goods were sold on a three months' credit, and that the arrest took place before the three months had expired, it would be a fatal variance, 5 Esp. 162. *White v. Jones*, per Lord *Ellenborough* C.J. The same rule holds in an action against an attorney for negligence in conducting a suit. *Peake*, 161. *Lee v. Ayrton*. In this action against the sheriff for an escape, as also in one for not arresting

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WELBY.

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The plaintiff for
the recovery of
his debt sued
out a writ
against the said
J. W.

directed to the
sheriff of L.

* See ante,
p. 52. note (1).

which writ was
delivered to the
defendant then
sheriff of L. to
be executed.

had not paid at or upon the said 2d day of *February* to the said *Christopher* according to the form and effect of the said bill, whereby and by force of the said bill the said 392*l.* became forfeited to the said *Christopher*; and whereas also, the said *John* being in form aforesaid indebted in the said 392*l.*, he the said *Christopher* afterwards, to wit, in the term of the holy *Trinity*, in the 20th year of the reign of our lord *Charles* the 2d now king of *England*, &c. for the recovery of the said 392*l.* prosecuted out of the court of our said lord the king before the king himself at *Westminster*, commonly called the king's bench, in the county of *Middlesex*, a certain writ of our said lord the king against the said *John*, directed to the sheriff of *Lincoln*, by which said writ our said lord the king commanded the said then sheriff of *Lincoln*, that he should take the said *John*, if he should be found in his bailiwick, and him safely keep so that he should have his body before our said lord the king at *Westminster* on *Friday* next after three weeks of *St. Michael* then next following, to answer the said *Christopher* of a plea of trespass, and also* to a bill of the said *Christopher* against the said *John*, for the said 392*l.* of debt, according to the custom of the court of our said lord the king before the king himself to be exhibited, and that the said sheriff should have there then that writ; which said writ the said *Christopher* afterwards and before the return thereof, that is to say, on the last day of *August* in the 20th year aforesaid at the castle of *Lincoln* in the said county of *Lincoln*, delivered to the said *William*, then sheriff of the county of *Lincoln*, to be executed in due form of law, to the intent that the said *John* by virtue thereof should be taken and arrested, and on the day of the return thereof in the said court of our said lord the king before the king himself should be by virtue of the said writ committed to the custody of the marshal of the marshalsea of our lord the king before the king himself, according to the custom of the said court from time whereof

or for a false return, whatever evidence would be sufficient to charge the original party in a suit against him, will also be admissible as evidence against the sheriff. Thus in 2 Esp. N. P. C. 695. *Slaman v. Herne*, an acknowledgment by the party, that the money had been paid on his account by the testator of the plaintiff, was admitted; and in two

other cases, 2 Camp. 188. *Gibbon v. Coggon*, and 2 Stark. 42. *Williams v. Brydges*, where the debt arose on a bill of exchange, an acknowledgment by the party (the drawer of the bill) of having received notice of its dishonour, was held to be sufficient evidence of that fact, 2 Phill. Evid. 283, 284.

the memory of man is not the contrary used and approved of, or else should put in, in the said court of our said lord the king before the king himself, according to the custom of the said court for the whole time aforesaid used and approved of, sufficient bail to answer the said *Christopher* in the plea aforesaid. (3) And the said *Christopher* in fact says, that after the delivery of the writ aforesaid in form aforesaid, and before the said day of the return of the said writ, to wit, on the 20th day of *October* in the 20th year aforesaid at the castle of *Lincoln* aforesaid, the said *William*, being then as aforesaid sheriff of the said county of *Lincoln*, took and arrested the said *John* by virtue of the said writ, at the suit of the said *Christopher*, and then and there had him in his the said sheriff's custody by virtue of the said arrest, and brought him the said *John* so in his custody to *Ripon* in the county of *York*. Yet the said *William*, then being sheriff of the county of *Lincoln* as aforesaid, contriving and intending wholly to deprive the said *Christopher* of the 33rd L., and of his remedy for the recovery thereof afterwards, to wit, on the said 20th day of *October* in the 20th year aforesaid at *Ripon* aforesaid, permitted the said *John*, so being in the custody of the said *William* then being sheriff of the said county of *Lincoln*, to go at large wherever he would, and to escape out of the

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Defendant arrested the said J. W. by virtue thereof.

Breach.

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But permitted him to escape.

(3) It is holden that the indorsement of *non est inventus* on the writ is sufficient evidence of its having been delivered to the sheriff in an action against him for an escape of a person taken either on mesne process, or in execution; and therefore, as it is not averred in this declaration that the sheriff made a warrant to his bailiff to arrest such person, it is not necessary

to prove a warrant by him to his bailiff for that purpose; but the return of *non est inventus* is sufficient evidence against the sheriff that the writ was delivered to him. Cowp. 69. *Blatch v. Archer*. And for the same reason the indorsement of *cepi corpus, et paratum habeo* on the writ, seems to be sufficient evidence of its having been delivered to the sheriff. [b]

[b] If the sheriff return *cepi corpus*, proof of this, and that the party neither put in bail above, nor was in the sheriff's custody at the return of the writ, dispenses with the direct evidence of the arrest and escape; both of these facts being sufficiently proved by the sheriff's return, and by the non-appearance of the party according to the exigency of the writ. 3 Camp. 397.

Fairlies v. Birch. 2 Phill. Ev. 292. But if the sheriff return *non est inventus*, then the return is evidence of the delivery of the writ only; and the sheriff must be connected with the acts of his officer, either in not arresting the party when he had an opportunity, or in letting him escape after arrest, by other evidence. As to the mode of so connecting him, see 2 Phill. Ev. 276. et seq.

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and falsely re-
turned that he
had him ready.

custody of the said *William* then sheriff of the said county of *Lincoln*, (the said *Christopher* then and yet not being satisfied of the said 332*l.* or any part thereof,) and upon the said writ on the said *Friday* next after three weeks of *St. Michael*, before our said lord the king at *Westminster*, falsely and fraudulently returned that he had taken the body of the said *John*, which said body he had ready before our said lord the king on the day and at the place in the writ aforesaid contained, as by the said writ the was commanded: whereas in truth the said *William*, then sheriff of the said county of *Lincoln*, had not the body of the said *John* ready before our said lord the king, on the day and at the place in the said writ contained, whereby the said *Christopher* is wholly defrauded of the said 332*l.*, and of his remedy for the recovery thereof: wherefore the said *Christopher* says that he is worse, and has damage to the value of 500*l.*, and therefore he brings suit, &c.

Imparlance.

And now at this day, to wit, on *Friday* next after the morrow of the *Holy Trinity* in this same term, until which day the said *William* had leave to imparl to the said bill and then to answer, &c. before our lord the king at *Westminster* comes as well the said *Christopher Benson* by his attorney aforesaid, as the said *William Welby* by *Thomas Walpool* his attorney; and the said *William* defends the wrong and injury when, &c., and prays judgment of the declaration aforesaid*, because he says that the declaration aforesaid, and the matter in the same contained, are not sufficient in law for the said *Christopher* to have his said action thereof maintained against the said *William*; to which said declaration the said *William* has no necessity, nor is he bound by the law of the land in any wise to answer; and this he is ready to verify; wherefore for want of a sufficient declaration in this behalf, the said *William* prays judgment of the said declaration, and that the same may be quashed, &c.

Demurrer.

* See ante, 114.

Joinder in de-
murrer.

And the said *Christopher* says, that he, by any thing by the said *William* above in pleading alleged, ought not to be barred from having his aforesaid action thereof against the said *William Welby*, because he says that the declaration aforesaid, and the matters in the same contained, are good and sufficient in law for him the said *Christopher* to have his aforesaid action thereof maintained against the said *William*, which said declaration and the matters in the same contained he the said *William* is ready to verify and prove as the court, &c. and because the said *William* does not answer the said declaration,

nor does hitherto in anywise deny the same, the said *Christopher* prays judgment and his damages on occasion of the said premises to be adjudged to him, &c.; but because the court of our said lord the king now here is not yet advised what judgment to give of and upon the premises, a day therefore is given to the parties aforesaid before our lord the king at *Westminster* until *Saturday* next after three weeks of *St. Michael*, to hear their judgment of and upon the premises, because the court of our said lord the king now here is thereof not yet advised, &c. At which day before our lord the king at *Westminster*, (and so it is continued from term to term,) come the parties aforesaid by their attornies aforesaid, whereupon all and singular the premises being seen, and by the court of our said lord the king here more fully understood, and mature deliberation thereupon had, it seems to the court of our lord the king here, that the said declaration of the said *Christopher*, and the matters in the same contained, are good and sufficient in law for the said *Christopher* to have his aforesaid action maintained against the said *William Welby*, for that the said *William Welby* has not pleaded the statute made in the 23d year of king *Henry* the 6th, of bonds taken by sheriffs for the appearance of prisoners in their custody by virtue of process mentioned in the said act, wherefore the said *Christopher* ought to recover his damages against the said *William* on occasion of the said premises. But because it is unknown to the court of our said lord the king now here what damages the said *Christopher* has sustained in this behalf, therefore the sheriff is commanded that by the oath of good and lawful men of his county he diligently inquire what damages the said *Christopher* has sustained as well on occasion of the said premises, as for his costs and charges by him about his suit in this behalf expended, and the inquisition which he shall thereon make, he send to our lord the king at *Westminster* on *Monday* next after three weeks of *St. Michael* under his seal, and the seals of those by whose oath he shall take the said inquisition, together with the writ of our lord the king to him thereof directed: the same day is given to the said *Christopher* there, &c. At which day before our lord the king at *Westminster*, comes the said *Christopher* by his attorney aforesaid; and the sheriff, to wit, Sir *Philip Mouncton* knt. sheriff of the said county of *York*, returned a certain inquisition taken before him at the castle of *York* in the said county of *York*, on the 26th day of *July* in the 22d year of the reign

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*Curia advisare
vult.*

The declaration
sufficient, be-
cause the de-
fendant did not
plead the statute
23 H. 6. c. 9.
of sheriffs' bonds.

wherefore the
plaintiff ought
to recover his
damages.

Writ of Inquiry
awarded.

Inquisition re-
turned.

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Final judgment.

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of our lord *Charles* the second now king of *England*, &c. by the oath of good and lawful men of his bailiwick, by which it is found that the said *Christopher* has sustained damages on occasion of the said premises, besides his costs and charges by him about his suit in this behalf expended, to 200*l.* and for those costs and damages to 6*d.* Therefore it is considered that the said *Christopher* recover against the said *William* the damages aforesaid, by the said inquisition above found, and also 14*l.* 19*s.* 6*d.* for his costs and charges by him about his suit in this behalf expended, adjudged of increase to the said *Christopher* by the court of our said lord the king now here at his request; which said damages in the whole amount to 215*l.* And the said *William* in mercy, &c.

Case 26.

Benson *versus* Welby late Sheriff of Lincoln.

Trin. 21. Car. II. Regis. Rot. 1505.

S. C. 1 Vent.
55. 85.
1 Sid. 439.
1 Mod. 33. 57.
2 Keb. 591. 626.
630. 657. 670.
The statute
23 H. 6. c. 9.
of sheriffs' bonds
is only a private
statute, of which
the court will
not take notice
unless it be
pleaded.

ACTION upon the case by *Benson* against *Welby* late sheriff of *Lincoln*; the plaintiff declares that one *Wright* was indebted to him in 332*l.* upon a penal bill obligatory, and for the recovery of the said debt he sued a writ out of this court against *Wright*, directed to the sheriff of *Lincoln*, returnable on *Friday* next after three weeks of *St. Michael*, by force of which writ the defendant then sheriff of *Lincoln* arrested the said *Wright*, and afterwards suffered him to escape, the plaintiff not being satisfied of his debt, and at the return of the writ the defendant falsely and fraudulently returned a *cepi corpus et paratum habeo*: whereas in truth the defendant had not the body at the return of the writ, whereby the plaintiff was defrauded of his remedy for the recovery of his debt, wherefore he brought this action: the defendant demurred in law.

And it was objected for the defendant, that here was an action for a false return of a *cepi corpus et paratum habeo*, where such action is not maintainable, because the statute 23 H. 6. c. 9. compels the sheriff to let his prisoner at large upon reasonable sureties of persons having sufficient within the county, and nevertheless the sheriff shall return a *cepi corpus* as before the statute.* And this was not denied by the court, or by the counsel on the other side; but it was

* See ante, 60.

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WELBY.

argued for the plaintiff, that this was an action for the escape of the prisoner, and although a false return was alleged, yet it was nothing but surplusage, and should not hurt the action which was good for the escape before. And if it should be intended that the plaintiff has brought the action as well for the false return as for the escape, still the declaration was good for the escape, and he ought to have judgment for that, though he should be barred for the false return. But should it be intended one way or the other, yet in this case the plaintiff ought to have judgment for the whole; for if the defendant would have aided himself by the statute, he ought to have pleaded it, and shewn that he let the prisoner to bail according to the statute, and so would have been excused. But now the defendant has demurred generally to the declaration, and so has lost the advantage of the statute, which is a private one, of which the court will not take any judicial notice, unless the party shews it in pleading, as it has been oftentimes adjudged. And even if the court would take notice of the statute without its being pleaded, yet it does not appear on the record, as it now is, that the defendant has pursued it in letting the prisoner at large *upon sureties* according to the said act; for the declaration charges him directly with an escape, which the defendant has now acknowledged by his demurrer; wherefore judgment was prayed for the plaintiff.

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And the court seemed to be of different opinions about the declaration, namely, some that the declaration was for a false return only, and that all the precedent matter was only inducement; and others that the declaration was for an escape only, and the other matter was but surplusage, and not material; and a third opinion was, that the action was brought for an escape, and a false return also: but the court did not agree in this matter. (5) But the whole court resolved, that judgment should be given for the plaintiff for this cause, that the defendant had not pleaded the statute, *and shewn the matter of fact*; for it was agreed by the court, that the statute was a

(5) However it seems to be a declaration for an escape; it not being unusual in this action to add, that the sheriff returned "*non est inventus*," or the like, to the averment that the defendant suffered the party to escape. [c]

[c] In all declarations against the sheriff in actions for defaults in executing mesne process, it is advisable to insert three counts; one for an escape, another for not arresting, and a third for not assigning the bail-bond. See the reasons for this, ante, p. 61 b. note [f].

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private statute of which the court would not take any notice unless it be pleaded. But *Twysden* justice said it had been settled before that time, that the statute was but a private statute of which the court would not take cognizance without its being pleaded; but if it was now to be settled again, he thought it ought to be ruled and settled otherwise; but the court cannot recede from former resolutions and judgments (6); and

(6) The demurrer seems to be improper in any point of view, whether the statute be a public, or a private one. For if it were a *public* statute, of which the court was bound to take judicial notice without being pleaded, still the defendant ought not to have *demurred* to the declaration, but should have stated those facts which would have brought his case within the statute, in the same manner as is necessary where a defendant protects himself under the authority of any other general law, and so have shewn that he had acted under the statute, and was justified by it in letting the prisoner go at large, and yet returning *cepi corpus, et paratum habeo*, which he might well do, though he suffered him to go at large. And on the other hand, if it were a *private* statute, the defendant should have *pleaded* the statute, as well as have stated the facts which brought him within it. Or, as this was an action on the case, the defendant might have pleaded *not guilty*, and given the act and other special matter in evidence. 1 Sid. 439. 1 Vent. 85. Therefore it appears that the decision of the court was right, though one of the reasons for giving it does not exist any longer.

It seems not a little extraordinary, that a statute which concerns the administration of the public justice of the whole kingdom, should ever have been construed to be a *private* statute; and indeed some very able men, particularly *Rolle* and *Glyn*, who were successively chief justices of the king's bench, were

of opinion that it was a general law. 1 Lev. 86. *Bentley v. Hore*. There is no wonder therefore, that *Twysden* J., who was also a very great lawyer, discovered so great a disapprobation of the authorities in which the statute had been considered to be a private statute; but he thought himself bound by them against his own private opinion and the reason of the thing. To be sure the authorities alluded to by *Twysden* J. were very strong and difficult to be got over. Thus in *Moor*, 428. *Laughton v. Gardner*, an action on the case was brought against the sheriff, who returned *cepi corpus et paratum habeo*, whereas in truth he had not the party, wherefore the plaintiff had lost his suit; the defendant demurred, and it was adjudged for the plaintiff, because by the demurrer the sheriff had confessed the false return, and the plaintiff's loss; but if the sheriff had pleaded the statute 23 H. 6. and shewn how he had bailed the party, and taken a bond, it seemed to *Popham* that the plaintiff would be barred of this action on the plea. Cro. Eliz. 460. S. C.: and *Dyer*. 119. a. Plow. 65. a. *Dive v. Manningham*. 4 Rep. 76 a. b. *Holland's case*. Hob. 13. *Norton v. Simme*, are all authorities to the same effect. But in subsequent cases these authorities have been questioned, and at last overruled. Thus in 2 Lev. 103. *Oky v. Sell*, Lord *Hale* held that the statute was a general law, of which the court would take judicial notice without pleading. In 1 Str. 399. *Mills v. Bond*, the court took notice of

therefore it was adjudged for the plaintiff.—*Jones and Saunders* with the plaintiff; *Winnington and Levinz* with the defendant. BENSON v. WELBY.

The same judgment in the same case was given in this term between *Parker v. Welby*, which is entered Trin. 21st. of the now king, Rol. 1503.

the act without its being pleaded. And in Doug. 97. *Boyce v. Whitaker*, note (12), Lord Mansfield asked, if there was any doubt whether the statute was a public act, and *Davenport*, as *amicus curiæ*, said it had been doubted, and was therefore always set out; and so certainly is 3 Lev. 74. *Graham v. Crawshaw*. And in Bull. Nisi Prius, 224. it is said that though it be regularly true, that a private law shall not be taken notice of unless it be shewn, yet it will be otherwise in case such private law be recognised by a

public one; for instance, the 23 H. 6. c. 9. relative to sheriff's bonds is a private law, yet the statute 4 Ann. c. 16. having enabled the sheriff to assign such bond, the court must take notice of the law that enables him to take such bond. And lastly, in 2 Term Rep. 569. *Samuel v. Evans*, in which all the authorities were cited, it was adjudged that the 23 H. 6. c. 9. relating to bail bonds is a public act, and therefore the court will take notice of it, though it is not pleaded. [d]

[d] 15 East, 323. *Lovell v. Sheriff of London*.

Hunlocke versus Blacklowe.

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Case 27.

Easter, 22 Car. II. Regis. Rot. 2880.

DEBT on bond, dated the last day of *July* in the 16th year of the reign of the now king, conditioned to perform covenants in articles of agreement. The defendant, after oyer of the condition, sets out the articles, by which it appears that the plaintiff, being a taylor, had assigned his trade to the defendant, and all the benefit of the customers named in a schedule annexed to the articles, and the plaintiff covenants with the defendant, *that he would from thenceforth leave off and desist from using and exercising the trade of a taylor with any of the customers named in the schedule*, with several other covenants on the part of the said plaintiff to be performed, and the said defendant, *in consideration of the performance thereof*, covenants that he will pay the plaintiff 100*l.* a year

S. C. 1 Mod. 64.
1 Sid. 464.
2 Keb. 674.
If a covenant on one part be negative, and an affirmative covenant on the other part be in consideration of the performance thereof, though the negative covenant be broken, yet the affirmative covenant ought to be performed.

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LOWE.

during his life by quarterly payments (1), with divers other covenants on the part of the said defendant to be performed; and the defendant, after he had shewn all the covenants, pleads in bar that the plaintiff, after the making of the said articles,

(1) This bond seems to be founded on a good consideration; for though a bond, covenant, or promise, even on good consideration, not to use a trade *any where in England*, is void, as being too general a restraint of trade; yet if such bond, covenant, or promise, be not to use a trade *at a particular place*, it is good. All. 67. *Prugnell v. Gosse*. For the same reason it seems, that a bond, covenant, or promise, not to use a trade with *particular customers* by name, if founded on a good consideration, is also valid. All the cases on this subject prior to *Mitchell v. Reynolds*, 1 P. Will. 181. are noticed in that case. There in debt on bond, the defendant prayed oyer of the condition, which recited, that whereas the defendant had assigned to the plaintiff a lease of a messuage and bake-house in L. in the parish of St. A. for the term of 5 years; if the defendant should not exercise the trade of a baker *within that parish* during the said term, or in case he did, should, within 3 days after proof thereof made, pay to the plaintiff 50*l*. then the obligation to be void, and pleaded that he was a baker by trade, that he had served an apprenticeship to it, by reason whereof the bond was void in law, wherefore he traded, as he well might; and on demurrer, the court was of opinion, that a special consideration being set forth in the condition, which shews it was reasonable for the parties to enter into it, the bond was good; and that the true distinction was not between *promises* and *bonds*, but between contracts *with* and *without* consideration: and that wherever a sufficient consideration appeared to make it a proper and a useful con-

tract, and such as could not be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is *general* not to exercise a trade *throughout the kingdom*, and where it is limited to a *particular place*; that the former is void, being of no benefit to either party, and only oppressive; but the other is good.

The principle of this case was afterwards recognised and adopted in 2 Str. 739. *Chesman v. Nainby*. 2 Ld. Raym. 1456. 3 Brown. P. C. 349. S. C. So where the condition of a bond was that, in consideration A. would take B. as an assistant in his business as a surgeon, for so long a time as it should please A., B. agreed not to practise on his own account for fourteen years within ten miles of the place where A. lived, the bond was held good. 5 Term Rep. 118. *Davis v. Mason*. See 1 Brown, C. C. 418. *Slovan v. Walter*. And where by indenture between A. and B. and C., dissolving their partnership as ropemakers, A. and B. covenanted to allow C. during his life, two shillings on every hundred weight of cordage which they should make on the recommendation of C. for any of his friends and connexions, and whose debts should turn out to be good: and that A. and B. should stand the risk of such debts incurred; but *should not be compelled to furnish goods to any of C.'s connexions whom they should be disinclined to trust*. And C. covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts contracted, or to be contracted in his or their name, pursuant to the indenture, should be the exclu-

to wit, on the first day of *August* in the aforesaid 16th year at, &c. used and exercised the art and mystery of a taylor for and with the said Mr. *Pierrepoint* (namely, one of the customers named in the schedule) for the sole benefit of the said plaintiff, &c. to which plea the plaintiff demurred in law.

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And it was urged by *Saunders* for the defendant, that the words, "*in consideration of the performance thereof*," make a condition precedent, so that when the plaintiff had broken his covenant by using his trade with one of the customers, the defendant was not bound any longer to pay the 100*l.* a year to the plaintiff. And here the plaintiff had used his trade with one of his customers before any payment of the 100*l.* a year became due, and therefore the defendant was discharged from the payment of the 100*l.* a year. And to prove that this was a condition precedent, he cited 3 Leon. 219. *Brocas's* case, where the lord of a manor covenanted to assure the freehold to one of his copyholders and his heirs, and the copyholder *in consideration of the same covenant performed*, promised to pay a certain sum of money; and it was adjudged, that the copyholder was not obliged to pay the money until the lord had first performed the covenant on his

1 Saund. 320.
note (4).

sive property of A. and B.; and that C. should during his life exclusively employ A. and B. and no other person, to make all the cordage ordered of him, by or for his friends and connexions, on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever: it was holden, that the covenant by C. to employ A. and B. exclusively to make cordage for his friends, and not to employ any other, A. and B. not being obliged to work for any other than such as they chose to trust, was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed together according to the apparent reasonable intent of the parties;

and the general object being only to appropriate to A. and B. so much of C.'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred: and C. was still at liberty to work for any of his friends, who were refused to be trusted by A. and B.; by which construction the restraint on C. was only co-extensive, as in reason it could only be intended to be, with the benefit to A. and B.; and therefore the restraint on C. could be no prejudice to public trade. 8 East, 80. *Gale v. Reed*. But the defendant, being dissatisfied with this judgment, was advised to bring a writ of error into the Exchequer Chamber; but what became of it the editor has never heard. [a]

[a] See also Willes, 388. *The Master &c. of Gunmakers v. Fell*, per Willes C. J. 4 East, 190. *Bunn v. Guy*.

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part; but it is otherwise, says the book, if the covenant on the part of the copyholder had been, in consideration of the covenant to be performed. And here the words are, *in consideration of the performance* of the plaintiff's covenant, which is as much as to say, *in consideration of the covenant performed*. Wherefore he concluded that here was a condition precedent, which being broken, the defendant is not bound to pay the 100*l.* a year.

Sed non allocatur; for the plaintiff's covenant being in the nature of a negative covenant, namely, that he will not use his trade with the customers, if the words *in consideration of the performance thereof*, should amount to a condition precedent; the plaintiff would never have the 100*l.* a year during his life, because it is not possible for the plaintiff to perform his covenant in his life-time; for at any time during his life he may break it, and a negative covenant is not said to be performed until it becomes impossible to break it; which impossibility can only happen here by the plaintiff's death.

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A negative covenant is not said to be performed, until it becomes impossible to break it.

And therefore such a construction would entirely defeat the intention of the parties; for it plainly appears that their intent was that the plaintiff should have the 100*l.* a year during his life, and therefore it is not a condition, but the defendant may have *his action of covenant* against the plaintiff for breach of the covenant on his part. And although it was urged that the 100*l.* a year should be paid until the plaintiff has broken the covenant on his part, and no longer, and that such was the true meaning of the parties; and when the plaintiff has voluntarily broken the covenant on his part, he seems to be content that the 100*l.* a year should not be paid any longer, yet this was over-ruled by the court. Wherefore it was adjudged for the plaintiff. (2)

(2) See 1 Saund. 320. *Pordage v. brook v. Woodrow*, in which last case *Cole*, note (4.) Gilb. Law of Evid. 194. the reader will find very material observations made on the case of *Boone v. Eyre*, cited in note (4.) to *Pordage v. Cole*. See *Peeters v. Opie*, post, 350. 1 Str. 569. *Lock v. Wright*. Willes's Rep. 146. *Mucklestone v. Thomas*, Ibid. 157. *Acherley v. Vernon*, and Mr. Durnford's note (a.), Ibid. 496. *Thomas v. 352. note (3.) Holdipp v. Otway*, antea, *Cadwallader*, 2 H. Black. 178. *French 106.* *v. Campbell*, 8 Term Rep. 366. *Glaze-*

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Case 28.

Trin. 21 Car. II. Regis. Roll. 8. among the pleas of the king.

Surrey, to wit. } OTHERWISE, to wit, in the week next after Caption.
the feast of the *Translation of St. Thomas the Martyr*, that is to say, on the 14th day of *July* in the 20th year of the reign of our lord *Charles* the second, by the grace of God, of *England, Scotland, France, and Ireland* king, defender of the faith, &c. at the general quarter-session of the peace of our lord the king holden for the said county of *Surrey* (1), at *Guildford* in the same county, before *Arthur Onslow, Henry Hildyard, and William Elliott* esquires, and others their fellows, justices of our said lord the king assigned to keep the peace in the county of *Surrey* aforesaid, and also to hear and determine divers felonies, trespasses and other misdemeanors in the same county committed, *John Windebancke* esq. one of the justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses and other misdemeanors in in the same county committed, with his own hands then delivered into the court of our said lord the king there before the said justices a certain presentment lately made by the said *John Windebancke*, upon his the said *John Windebancke's* own proper knowledge and view, according to the form of the statute in such case made and provided. (2) *Surrey, to wit*, Be it remembered that at the general quarter-session of the peace of our lord the king holden for the county of *Surrey* aforesaid at *Guildford* in the same county, on *Tuesday* in the week next after the feast of the *Translation of St. Thomas the Martyr*, that is to say, on the 14th day of *July* in the 20th year of the reign of our lord *Charles* the second, by the grace of God, of *England, Scotland, France, and Ireland* king, defender of the faith, &c. before *Arthur Onslow, Henry Hildyard, and William Elliot* esquires, and other their fellows, justices of our said lord the king assigned to keep the peace in the county of *Surrey* aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county

(1) See 1 Saund.
308. Rex v.
Kilderby,
note (1).

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(2) The words, "*which said present-* is the usual practice now to add them.
ment follows in these words, or in See 1 Saund. 308. Rex v. Kilderby,
"*manner and form following, that is to* note (2).
"*say,*" seem to be wanting; at least it

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committed, came *John Windebancke*, esq. one of the justices of our said lord the king assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, in his proper person, and upon his the said *John Windebancke's* own proper knowledge and view, according to form of the (3) statute in such case made and provided then

(3) This was the statute 5 Eliz. c. 13. s. 9. which continued the statute 2 & 3 P. & M. c. 8.; but these, as well as all other statutes relating to the highways in general, were repealed by statute 8 Geo. 3. c. 5. and afterwards reduced into one act of parliament by statute 13 Geo. 3. c. 78., which is now the existing law upon this subject. The last-mentioned act preserves and enlarges that clause of the 5 Eliz., which gave a power to a justice of peace to present a highway on his own view; for by section 24 of the said statute 13 Geo. 3. it is enacted, that "every justice of assize, justices of the counties palatine of *Chester, Lancaster, and Durham*, and of the great sessions in *Wales*, shall have authority upon his or their own view, and every justice of the peace, either upon his own view, or upon information upon oath to him given by any surveyor of the highways, to make presentment at their respective assizes, or great sessions, or in the open general quarter sessions of the peace, of such respective limit, of any highways, causeway, or bridge, not well and sufficiently repaired and amended, or of any other default, or offence done contrary to this act, and that all defects in the repair thereof shall be presented in such jurisdiction where the same do lie, and not elsewhere; and no such presentment shall be removed by *certiorari*, or otherwise, out of such jurisdiction, till it be traversed and judgment thereupon given, except

"where the duty or obligation of repairing the said highways, causeways, or bridges, may come in question; and every such presentment made upon view, or information as aforesaid, shall be as good, and of the same force, strength and effect in the law, as if it had been preferred and found by the oaths of twelve men; and that for every such default or offence so presented, the justices of assize, counties palatine, and great sessions, at their respective courts, and the justices of the peace, at their general quarter sessions, shall have authority to assess such fines as to them shall be thought meet; saving to every person and persons that shall be affected by any such presentment, his, her or their lawful traverse to the said presentment, as well with respect to the fact of non repair, as to the duty or obligation of repairing the said highways, as they might have had upon any indictment of the same presented and found by a grand jury."

The words in italics were added to the saving clause, as it stood in the statute 5 Eliz. c. 13. s. 9., because it had been doubted, whether under that clause the party, against whom such presentment was made, could traverse the fact of want of repair, though the better opinion undoubtedly was that it might be traversed. Carth. 212. *Rex v. Hornsey*, 1 Show. 270. 291. 4 Mod. 38. S. C. 1 Hawk. P. C. c. 70. s. 72. 3 Burr. 1530. *Rex v. Justices of Wiltshire*.

and there in the court of our said lord the king, before the said justices presented, that a (4) certain common highway lying in the parish (5) of *Stoke* near *Guildford* in the county aforesaid, leading between (6) the market town of *Guildford* aforesaid, REX v. STROUGHTON.

If an indictment, or presentment, for not repairing a highway be against the inhabitants of a parish at large, who are bound of common right to repair all the highways lying within it, they may, upon *not guilty* shew that it is in repair, or that it is not a highway, or that it does not lie within the parish; for all these are facts which the prosecutor must allege in his indictment, and prove on the plea of not guilty: and it is a well known rule of law, that whatever a plaintiff or prosecutor is bound to prove on the general issue pleaded to a declaration or indictment, the defendant may controvert the truth of, by opposite evidence. 1 Str. 181, 182, 183. *Rex v. Inhabitants of Norwich.* [a]

It is holden that such presentment may be removed by the prosecutor by *certiorari* before it is traversed and judgment given thereon, Cowp. 78. *Rex v. Bodenham*, agreeable to what had been before determined upon the statute 22 Car. 2. c. 12. s. 4. from which that part of the above section was copied. 2 Str. 1209. *The King v. Farewell.*

(4) Though it is often stated in indictments, or presentments, for nuisances to highways, that "*from time whereof the memory of man is not to the contrary, or from time immemorial,*" there was and is a common and ancient king's highway, yet it is not necessary to do

so; for it has been adjudged that it is sufficient to state, both in indictments, and in pleas in trespass justifying under a right of way, in a compendious manner, *that it is a highway.* 3 Term Rep. 265. *Aspindall v. Brown.*

(5) The highway must be alleged in the presentment, or indictment, to lie in the parish indicted, otherwise it is not bound to repair it; and if it be not so alleged, the indictment, or presentment is erroneous, and judgment will be reversed. Cowp. 111. *Rex v. Hartford.*

(6) Here the highway is described as leading *between Guildford and Oak-ingham*, so that they are both necessarily excluded; so if the highway be described as leading *from* one parish *unto* another, both parishes are excluded. Therefore, where in an indictment against a parish for not repairing a highway, it was stated that, "from time whereof, &c. there was and yet is a common and ancient king's highway leading *from* the parish of H. in the county of C. *towards* and *unto* the parish of G. in the county aforesaid, for all the liege subjects, &c. and that a certain part of the same king's common highway, situate, lying, and being in the said parish of G. containing in length, &c. on, &c. was and yet is in great decay;" after verdict for the prosecutor, judgment was ar-

[a] And accordingly in an indictment against a parish for not repairing, though the plea is *not guilty* only, a *certiorari* is grantable under 5 W. & M. c. 11. s. 6. though before traverse and judgment thereon, for under that issue

the right to repair may come in question (as appears by the learned serjeant's note above); in which case the statute gives a *certiorari* before traverse, &c. 3 M. & S. 465. *Rex v. Taunton St. Mary.*

REX v. STOUGHTON: said in the county aforesaid, and the market-town of *Okingsham* in the county of *Berks*, in, through, over, and upon a certain piece of land lying in the parish of *Stoke* near *Guildford* aforesaid in the county of *Surrey* aforesaid, called *Stoke Common*, containing in length (7) 270 rods, being from time

rested, because it was not stated in the indictment that the highway out of repair lay in the parish of G.; for the word *into* the parish of G. excludes that parish according to 2 Roll. Abr. 81. pl. 19. where it is said, that "if A. be indicted for stopping a highway at D. leading from D. to S., it is not good, because it is not alleged that the highway lies in D., for from D. excludes it;" and a parish is only bound to repair, if the highway indicted lies within it; and the court held that this was not aided by the subsequent allegation that a certain part of the same highway situate, &c. in the parish of G. &c. is in decay, &c. 3 Term. Rep. 513. *The King v. Gamlingay*. See Latch. 183. *Halsey's case*. Cas. temp. Hardw. 105. *The King v. All Saints and Saint Mary*. 4 Burr. 2090. *Rex v. Harrow*. See 5 East, 255. *The King v. Stephens*.

However, it does not seem to be at all necessary to state in the indictment or presentment, that the highway leads from one place to another, for the highways have no other bounds but the sea; therefore if the *terminus a quo*, and the *terminus ad quem*, are omitted, it appears that the indictment, or presentment, or a plea justifying a trespass because the place is a highway, is nevertheless good. Latch. 183. *Halsey's case*. Palm. 389. 2 Roll. Rep. 412. *Nottingham's case*. 1 Str. 44. *Rex v. Hammond*. 10 Mod. 382. S. C. 1 H. Black. 351. *Rouse v. Barden*; & Andr. 145. *The King v. Haddock*, in which case Lee C. J. said, that the objection "that the river T. where the nuisance was committed,

"being a highway, the *terminus a quo*, and the *terminus ad quem*, ought to have been set out, has been given up, and not without reason; for it was over-ruled in the case of *The King v. Hammond*, which was an indictment for a nuisance in a street, and it was objected, that there was no description of the highway by mentioning the *terminus a quo*, and *terminus ad quem*; and 1 Roll. Rep. was cited in support of the objection; but the court held that it was not necessary, because highways have no bounds; and Parker C. J. cited *The King v. Thompson*, 10 W. 3. where it was so determined." And though Mr. Serjeant Hawkins says (1 Hawk. P. C. c. 76. s. 86.) that it is safest to shew both the place from which, and also the place to which the way supposed to be out of repair doth lead, yet he says that exceptions for want of such certainty have sometimes been disallowed: and probably he was not aware of the before mentioned cases of *The King v. Thompson*, *The King v. Hammond*, and *The King v. Haddock*.

(7) It is said to be necessary to allege in the indictment or presentment to what part of the highway the nuisance complained of does extend, as by shewing how many feet in length, and how many feet in breadth, it contains. The reason assigned is, that, if it be not, the defendant will not know the certainty of the charge against which he is to make his defence, nor will the court be able to judge what will be the proper fine to assess. 1 Hawk. P. C. c. 76. s. 88. Cas. temp. Hardw. 106. per Lee C. J. Ibid.

whereof the memory of man is not to the contrary, a common king's highway for all the liege subjects of our said lord the king, and his predecessors, kings, and queens of *England*, with *their horses* (8), *carts*, and *carriages*, to go, pass, and labour at their pleasure, on the 5th day of *March* in the 18th year of the reign of our said lord the now king, became, and continually afterwards hitherto was, and yet is very ruinous, miry, deep, broken, and in great decay, for want of repairing and amending the said king's highway, so that the liege subjects of our said lord the king, with their horses, carts, and carriages in, through, and over the said king's highway, from the said 5th day of *March* in the 18th year aforesaid hitherto could not, nor yet can, go, pass, ride, and labour, as they were wont and ought to do. And that Sir *Nicholas Stoughton* of the parish of *Stoke* near *Guildford*, in the county of *Surrey* aforesaid, bart. being lord of the manor of *Stoke* in the parish of *Stoke* aforesaid, ought to repair and amend the said common king's highway, as often and when it was necessary, by reason of the tenure (9) of certain lands, parcel of the said

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316. *King v. Hatfield*. 1 Show. 390. *Rex v. Roberts*. But as the court does not at present estimate the fine from the description of the length and breadth of the road, as stated in the indictment, perhaps the want of stating it would not now be considered as a fatal objection. It has been held that an indictment for a nuisance, that a certain *highway and bridge* are in a ruinous condition, is not bad, for not setting out the length and breadth of the nuisance. Say, 301. nor for a nuisance in laying soil in a highway. *Ibid.* 98.

(8) The words in italics do not seem necessary: for where in an indictment for not repairing a highway, it was described to be a certain common king's highway called A. leading from B. to C., containing in length so much, and in breadth so much; after verdict for the king, it was objected in arrest of judgment, that the description was too uncertain, for it should have shewn whether it was a footway, or a way for carts, or for horses, &c. and so were the

precedents, as 2 Saund. 158. *Tremain*, 201. 205. Cro. Car. 266. *Rex v. Ward*. 1 Salk. 359., where judgment upon an indictment for not repairing *occidentalem partem communis pontis pedalis* was reversed, because *pons pedalis* does not signify a foot bridge, but a bridge a foot long, and therefore should have been *pons pedestris*; whereas, had the description of it, as *communis pons*, been sufficient, the court would have rejected the word *pedalis* as surplusage; But the court held the description to be good; for by Lord *Hardwicke*, the length and breadth of the way, and from whence and whither, are necessary to be ascertained in these indictments; but I do not remember any authority that holds it necessary to say, that it is a highway for this or that particular carriage; for if it is a *common highway*, it is a highway for all manner of things. Cas. temp. Hardw. 315. *Rex v. Hatfield*.

(9) It is said, that it is not safe in an indictment against a person for not re-

REX v. STOUGHTON. piece of land called *Stoke Common*, containing in length 270 rods, and in breadth 4 rods, lying on the west side of the said common king's highway so as aforesaid ruinous, miry, deep and in decay, by him the said Sir *Nicholas Stoughton*, on

pairing a highway, which he ought to have done in respect of the tenure of certain lands, barely to say, that he was bound to repair it *ratione tenuræ terræ*, without adding *suæ*. 1 Hawk. P. C. c. 76. s. 90. But the word *suæ* is omitted in this precedent; and it has been held not to be necessary; as where in an indictment for not repairing a highway, which the defendant was obliged to do *ratione tenuræ* of a certain house, which in another part of the indictment was mentioned to be the mansion house of the defendant; it was objected on the authority of 5 H. 7. 3. pl. 8. that the occupier, and not the owner, was chargeable to the repairs of the highway, and therefore the indictment should have been *ratione tenuræ suæ*, for it might be that the house was let to another, and Latch. 206. *Anon.* was cited. But the court upon consideration held it not necessary to lay it so, for *ratione tenuræ* implies it be such a tenure as makes him chargeable; and so it was held in 1 Vent. 331. *Rex v. Fanshaw*, which is entered Mich. 29. Car. 2. Roll. 12. There the defendant was charged *ratione tenuræ quorundam terrarum et tenementorum*, and exception was taken for want of *suorum*; but the

indictment held well enough: but if it were necessary to say *suæ*, the court thought it was implicitly averred by calling it afterwards his mansion-house; so *quâcunque viâ datâ*, the indictment was well enough. 1 Str. 187. *Rex v. Corrock*. It seems that the occupier, and not the owner, is the proper person against whom the indictment should be brought. For how are the public to know who is the owner of the lands charged with the repair? And it does not seem to be material what estate the occupier has in the lands liable. 1 Salk. 357. *Reg. v. Watts*, per Powell J. 7 Mod. 55. *Queen v. Bucknell*. [b]

In many precedents of indictments or presentments against persons for not repairing a highway by reason of tenure, it is stated that the party ought to repair by reason of his tenure, *as he, and all those who held the said lands for the time being, from time whereof the memory of man is not to the contrary, were used to do*; but it does not appear to be necessary to insert these words; for the obligation upon him to repair seems to be sufficiently shewn, by averring that he ought to do so by reason of the tenure of his lands, without adding that those who held the lands for the time being

[b] In 1 M. & S. 485. *Rex v. Kerrison*, it was held that an allegation charging the defendant with the repair of a bridge by reason of his being owner and proprietor of a certain navigation, was not equivalent to charging him *ratione tenuræ*. Afterwards the same defendant was indicted for not repairing the bridge, and it was shown in the indictment that he had cut

through an highway under the authority of a navigation act, and had built the bridge in question over the cut: the court held that he, and not the county, was bound to repair the bridge as long as the navigation continued. 3 M. & S. 526. *Rex v. Kerrison*. See also 13 East, 220. *Rex v. Inhabitants of Kent*. 14 East, 317. *Rex v. Inhabitants of Lindsey*.

the 25th day of *February*, in the 17th year of the reign of *Rex v.*
 our said lord the now king, inclosed and incroached from *STOUGHTON.*
 the said king's common highway, and by him the said Sir
Nicholas continued to be inclosed and incroached from the

have *immemorially* repaired. So in Co. Ent. 358. a. as well as in this entry, it is only stated, that the defendant ought to repair by reason of the tenure of his lands, &c. : and the very point seems to have been decided in Keilw. 52. pl. 4, in which it is said, that where a person is bound to repair a highway by reason of tenure, it is not necessary either in an indictment, or plea, to allege any title of *prescription*, because a prescription is *implied* in the estate of inheritance in the land ; but where a person is bound to repair such a highway by reason of *inhabitaney*, a prescription must necessarily be alleged, and this difference was admitted to be a good one by the whole court. See 1 Hawk. P. C. c. 76. pl. 8. S. P. It is true however that *Styles* 400, seems at first view to the contrary ; there a motion was made to quash an indictment for not repairing a highway upon two grounds, one, because it concluded that the party ought to repair it by reason of *his tenements*, which was too uncertain ; whereas it should have been, that he and all those whose estate he has in the tenements used to repair it ; and the other, that the indictment should have said, that by reason of the *tenure* of his tenements he ought to repair, and not by reason of his *tenements* ; and for these exceptions the indictment was quashed. But this authority, when it is considered, appears to be in favour of the proposition ; for it seems clear, that the true way of stating the liability to repair on account of lands or tenements is to say, that the party is bound to repair by reason of the *tenure* of

them ; and even if it could be laid, that he is so bound by reason of *his tenements*, then it would be necessary to allege, *that he, and all those whose estate he has*, used to repair ; so that either way the indictment was bad. And agreeable to the distinction taken in Keilway between an obligation to repair by reason of tenure, and of *inhabitaney*, it has been holden, that an indictment against a *particular part* only of a parish, such as a district, township, division, or the like, for not repairing a highway in the parish, stating that *the inhabitants* of the district from time immemorial *ought to repair and amend it*, is erroneous ; it ought to have stated that the inhabitants of such district from time whereof, &c. *have used and been accustomed*, and of right ought, to repair and amend it. For the inhabitants of a particular division of a parish are not bound to repair by common law, but their obligation must arise from custom, or prescription ; and therefore the indictment ought to shew the custom, prescription, or reason of their obligation. 5 Burr. 2700. *Rex v. Broughton*. S. P. Freem. 522. case of *St. Andrew, Holborn*. 3 Keb. 301. S. C. 3 Bac. Abr. 58. 2 Term. Rep. 111. *Rex v. Sheffield*. But an individual cannot be bound by prescription, that he and all his ancestors have repaired a highway or bridge, unless it be in respect of the tenure of his land, taking of toll, or other profit ; for the act of the ancestor cannot charge the heir without profit ; though a corporation, or a parish, or a part of it, may be charged by prescription to do so.

REX v. STOUGHTON. said 25th day of *February* in the 17th year aforesaid hitherto; and which said land so as aforesaid inclosed and incroached, for the whole time aforesaid until the said 25th day *February*, was parcel of the said common king's highway, and that he

13 Rep. 33. 1 Hawk. P. C. c. 76. s. 8. 3 Bac. Abr. 58. S. P. [c] Therefore if a parish lies partly in one county, and partly in another, and a highway lying in one part is bad, an indictment against the inhabitants of that part of the parish only, stating that the inhabitants of that part of the parish *ought* to repair, is bad; but the indictment must be against the *whole* parish. 5 Term. Rep. 498. *Rex v. Clifton*. 3 Bac. Abr. 57. S. P. though the contrary was once held in the case of *Rex v. Weston under Penyard*, 4 Burr. 2507. And upon the same principle it has been decided, that a presentment under the statute 13 Geo. 3. c. 78. s. 24. against a smaller district than a parish, must state expressly *how* the inhabitants thereof

are liable to the repair of the roads. 2 Term. Rep. 513. *Rex v. Penderryn*. S. P. Styles, 163. Andr. 276. *Rex v. Marton*. Where lands bound to the repair of a bridge, or highway, *ratione tenuræ*, are conveyed to several persons, every one of the grantees, being a tenant of any parcel, is liable to the *whole* charge, and must have contribution from the others. So where a manor so bound is conveyed to several persons, a tenant of any parcel, either of the demesnes or services, is liable to the whole repair, and may call upon the tenants of the residue to contribute: and the grantees are chargeable with the repair, though the grantor should convey the lands or manor discharged of the repair; and the grantees must

[c] An indicted parish pleaded as is recommended above, viz. that the inhabitants of a particular district within it from time immemorial, had used and been accustomed, and of right ought to repair. To this plea it was objected, that it ought to have shewn a *consideration* for such a charge on the inhabitants of the particular district. But the plea was held good, and the court observed that the matter of it had been treated as a prescription, but that it was more properly a custom, that customs must not be unreasonable, otherwise they are not good; and that a custom may be good, although the particular reason for it cannot be assigned. 1 B. & A. 348. *Rex v. Ecclesfield (Inhabitants)*. So it may be pleaded by the inhabitants of a county, that a particular township has from time immemorial repaired a highway at

the end of a county bridge, (otherwise repairable by the county at large; see 5 Taunt. 284. *W. Riding of Yorkshire v. Rex*), without shewing any consideration. 4 B. & A. 623. *Rex v. W. Riding of Yorkshire*. But if the subject matter of repairs be not *within* the district attempted to be charged, a consideration must be shewn; for such a charge (if it can be supported at all) must be by prescription, and cannot be by custom; and of every prescription there ought to be intended a lawful beginning, but as no common intendment can be presumed for such a charge, it is necessary to shew some special matter, whereby a lawful beginning may be intended. 5 M. & S. 260. *Rex v. St. Giles, Cambridge*; see also the judgment of Lord Ellenborough, in *Rex v. Ecclesfield*, ubi supra.

the said Sir *Nicholas* hath not repaired, or amended the said common king's highway, to the great damage and common nuisance of all the liege subjects of our said lord the king, going, passing, riding, and labouring in, through, over, and upon the said king's highway with their horses, carts, and carriages, and against the peace of our said lord the now king, his crown and dignity, &c., which said presentment our lord the now king afterwards for certain reasons caused to be brought before him to be determined, &c. Wherefore the sheriff of the county of *Surrey* was commanded that he should omit not, &c. but cause him to come to answer, &c.

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And now, to wit, on *Friday* next after the morrow of the *Holy Trinity* in this same term, before our lord the king at *Westminster* comes the said Sir *Nicholas Stoughton* by *John Goddin* his attorney, and having heard the presentment, says that he does not suppose that our said lord the now king will impeach him the said Sir *Nicholas* on occasion of the premises, because, protesting * that the said lands, above supposed to be inclosed and incroached, in the presentment aforesaid above as aforesaid specified or any parcel thereof, were not parcel of the said common king's highway, as is above presented: and protesting also that the said lands were not nor yet are in the tenure of him the said Sir *Nicholas*, for plea the said Sir *Nicholas* says, that the inhabitants of the parish of *Stoke* near *Guildford* aforesaid, from time whereof the memory of man is not to the contrary hitherto, have always repaired and amended, and been used to repair and amend, the common king's highway lying in the parish of *Stoke* near *Guildford* aforesaid, leading between the market town of *Guildford* aforesaid in the county aforesaid, and the market town of *Oakingham* aforesaid, in, through, and over the said piece of land lying in the parish of *Stoke* near *Guildford* in the county of *Surrey*

* Ante, 103.
note (1).

The parish of *S.* has immemorially repaired the said highway.

have their remedy against the grantor. And the reason seems to be, because the whole manor or land, and every part thereof, in the possession of one tenant, being once chargeable with the repair, it shall remain so, notwithstanding any act of the owner. For the law will not suffer him to apportion the charge, and so make the remedy for the public benefit more difficult; or, by alienation to insolvent persons, to ren-

der the remedy against such persons quite frustrate. And though such lands, or manor, come into the hands of the crown, yet the obligation or duty continues, and any person afterwards claiming the whole, or any part of it, under the crown, will be liable to an indictment for not repairing. 1 Salk. 358. *Reg. v. Duchess of Buccleugh*. See 3 Viner, Apportionment. 5. pl. 9.

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and traverses
that the defend-
ant ought by
reason of tenure
to repair it.

aforesaid, called *Stoke Common*, in the presentment aforesaid above specified: without this, that he the said Sir *Nicholas* ought to repair and amend the aforesaid common king's highway as often and when it was necessary by reason of the tenure of the said lands parcel of the said piece of land called *Stoke Common*, in manner and form as by the said presentment is above supposed. And this he is ready to verify; wherefore he prays judgment if the said lord the now king will any further impeach him on occasion of the premises (10), &c.

(10) It seems to have been unnecessary for the defendant to have pleaded any thing else but the general issue of not guilty; indeed this plea amounts to no more and is therefore bad, and might have been demurred to; for it appears to be a settled rule, that where a person is charged with the repair of a highway or bridge *against common right*, he may discharge himself upon *not guilty* to the indictment; and therefore where a particular division of a parish is charged with the repair by prescription, or a particular person by reason of tenure, or the like, which are obligations against the common law, they may throw the burden either on the parish, or even on an individual, on the general issue. 1 Str. 180. 183, 184. *Rex v. City of Norwich*. 3 Salk. 183. pl. 3. *Rex v. St. Andrews*. S. P. ruled by Lord Kenyon in *Rex v. Wheaton Aston*, Stafford Summer Assizes 1797. And the rea-

son seems to be, because upon this issue the prosecutor is bound to prove that the defendant is chargeable by tenure or prescription, and therefore the defendant may disprove it by opposite evidence. [d] However, if they will, though unnecessarily, *plead* the special matter, it is held not to be enough to say that *they ought not to repair*, but they must go further and shew *who ought*. 1 Sid. 140. *Rex v. Yarnton*. Carth. 213. *Rex v. Hornsey*. But if an indictment be against a *parish* for not repairing a highway, as it is an incontrovertible rule, that by the general law of the land the parish at large is *prima facie* bound to repair all highways lying within it, unless by prescription, or otherwise, they can throw the burden on particular persons; 1 Vent. 189. *Katherin Austin's case*. 1 Ld. Raym. 725. *Awon*. 2 Term Rep. 111. *Rex v. Sheffield*; it is quite settled, that the

[d] There is a difference between cases where the indictment charges a special prescription for a township to repair a particular road, and a general prescription to repair all roads within the township. In the former case the rule is, that it is sufficient for the defendants to shew that some others are liable, without fixing on the individuals, or shewing in certain, what lands are chargeable with the burthen; for such

evidence negatives the special liability imposed by custom, contrary to common law, on the township; but in the latter case, the prescription, if proved, places the inhabitants of the township in the same situation as the inhabitants of a parish, (see 2 B. & A. 179. *Rex v. Netherthong*); and so they must shew with certainty some other persons, bound to the repair. 4 B. & A. 80. *Rex v. Hatfield (Inhabitants)*.

And Sir *Thomas Fanshawe* knt. coroner and attorney of our lord the king in the court of our said lord the king before the king himself, who prosecutes for our said lord the king in this behalf, for our said lord the king says that the said

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parish cannot do so upon the general issue of not guilty, but they must set forth their discharge in a special plea. 1 Mod. 112. *Rex v. St. Andrews*. Vent. 256. *Anon.* 1 Hawk. P. C. c. 76. s. 9. [e] This obligation on the parish to repair is so much a matter of general right, that if particular persons were made chargeable to repair a highway by statute, and afterwards become insolvent, the justices of the peace may put that charge upon the rest of the inhabitants. 1 Ld. Raym. 725. *Anon.* So no agreement with any person can take off this charge which the law lays upon the parish. 1 Vent. 90. Therefore an indictment against an individual, or a corporation, for not repairing a highway which, by virtue of a certain agreement, they are bound to do, is bad. 3 East, 86. *Rex v.*

The Mayor of Liverpool. And if the inhabitants of a township, bound by prescription to repair the roads within the township, are expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, the charge must necessarily fall on the rest of the parish; 2 Term Rep. 106. *Rex v. Sheffield*; [f] but a parish is only liable if the road be out of repair, for it is no indictable offence that the road is very muddy, and so narrow that people cannot pass over it without danger of their lives, unless it also adds that it is out of repair. 2 Ld. Raym. 1169. *Reg. v. Stratford.*

If a person indicted for not repairing *ratione tenuræ*, or a township, or other particular persons for not repairing by

[e] But this rule does not apply where the burthen of repairing is transferred from the inhabitants of the parish by a public Act of Parliament, to which all are supposed to be privy, and of which all are supposed to have cognizance. 3 Camp. 223. *Rex v. St. George's Hanover Square*, per Lord Ellenborough C.J.

[f] So where a township was bound by a similar prescription, and a local act, after empowering the trustees under it to take tolls, directed that a new highway should from time to time be repaired by the trustees out of the money arising by virtue of the act; it was held, that this only made the tolls an auxiliary fund in the hands of the trustees, and that the inhabitants of the township (not the rest of the parish, as in *Rex v. Sheffield*), were bound to re-

pair the part of the road that was within it. 2 B. & A. 179. *Rex v. Netherthong*. [The inhabitants might, after conviction, have applied by motion for relief against the trustees under the 13 Geo. 3. c. 84. s. 33. *Ibid.*] Thus, although a statute enacts that the paving of a particular street shall be under the care of commissioners, and provides a fund for that purpose, and another statute passed for paving the streets of the parish contains a clause that it shall not extend to the particular street, yet the inhabitants of the parish are not exempted from their common law liability to keep that street in repair. The parish ought, in the first instance, to see that the street is properly paved, and seek a remedy over against the commissioners. 3 Camp. 222. *Rex v. St. George's, Hanover Square.*

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plea of the said Sir *Nicholas Stoughton* in form aforesaid above pleaded and the matter in the same contained are not sufficient in law to bar our said lord the king from having the presentment aforesaid, wherefore for want of a sufficient an-

prescription, plead (though unnecessarily) to the indictment, and shew who ought to repair, as they must do, it is necessary to *traverse* their obligation to repair; but if a *parish* is indicted for not repairing a highway, or a *county* for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to repair, for it is a *traverse of matter of law*, and such *traverse*, though very often inserted, is demurrable to, and therefore ought always to be omitted. [g] See 1 Saund. 23. *Bennet v. Filkins*, note (5).

Where different districts or townships of a parish have immemorially repaired the respective highways lying within them, and a highway in one of these districts being out of repair, the parish at large is indicted, as it may be, care must be taken that this prescription is pleaded to the indictment; for if judgment be given against the parish, whether after verdict upon not guilty, or by default, the judgment will be conclusive evidence afterwards that the *whole* parish is bound to repair, unless fraud can be shewn. Peake's Nis. Pri. 219. *Rex v. St. Pancras*. But fraud is only put for an example; for if the other districts can shew they had *no notice* of the indictment, the defence having been made and conducted entirely by the district in which the high-

way indicted lay, without their knowledge or privity, the court will consider it as being substantially an indictment against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in that parish. Doug. 421. *Rex v. Townsend*. 3d edit. *Rex v. Leominster*. Hil. 40. Geo. 3. K. B. [h] The way of pleading the prescription seems to be, that each district claiming an exemption from repair, should state in a separate plea to the indictment, "that the parish has immemorially been divided into a certain number of districts or townships called A. B. C. (naming them), and that the inhabitants respectively of the several districts of A. and C. (the district in which the highway lies) have immemorially been used and accustomed to repair and amend the several and respective highways, situate and lying in their said respective districts, independent of each other, and that the said part of the said highway in the said indictment mentioned lies in that part of the said parish called the district of C., and by reason of the premises the inhabitants of the said district ought to have repaired the same independent of the inhabitants of the said district of A. in the said parish. And this, &c. wherefore," &c. [i]

[g] But see 1 B. & A. 348. *Rex v. Ecclesfield (Inhabitants)*, and ante, vol. i. p. 23. note [g].

[h] 2 Campb. 494. *Rex v. Eardisland*. S. P.

[i] Where the plea by the parish

was, that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that *part* of the highway indicted

swer of the said Sir *Nicholas Stoughton* in this behalf he prays judgment, and that he the said Sir *Nicholas Stoughton* may be convicted of the premises in the said presentment above specified, &c.

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STOUGHTON.

And the said Sir *Nicholas Stoughton* by his attorney aforesaid, inasmuch as the said coroner and attorney of our said lord the king for our said lord the king does not answer the said plea, nor in any wise deny the same, but altogether refuses to admit the said verification, which said plea and the matter in the same contained the said Sir *Nicholas Stoughton* is ready to verify; wherefore he prays judgment, and that he may be dismissed by the court from the premises, &c.

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Joinder in demurrer.

The prosecutor then traverses the prescription, and issue is taken upon it. An issue of this sort was tried before Mr. Justice *Heath* and a special jury at

Hereford Summer Assizes 1800, in *Rex v. Inhabitants of Leominster*, and the jury established the prescription.

was within the township of G. B. &c., and that the residue was within the township of L. B. &c., and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c., this was held bad on

special demurrer, for not specifying *what part* of the highway lay within one township, and what part within the other. 11 East, 304. *Rex v. Bridekirk (Inhabitants.)*

Dominus Rex versus Stoughton.

Case 28.

Trin. 21 Car. II. Regis. Rot. 8. *inter placita regis.*

SIR *Nicholas Stoughton* bart. was presented at the sessions by a justice of the peace on his own knowledge and view, that the highway between *Guildford* in *Surrey*, and *Okingham* in *Berks*, namely, in *Stoke Common*, was very ruinous, miry, broken, and in great decay for want of repair, and that the said Sir *Nicholas Stoughton* ought to repair it by reason of the tenure of certain lands, parcel of the said piece of land called *Stoke Common*, by the said Sir *Nicholas* inclosed and incroached out of the said common king's highway, and which from time immemorial had been parcel of the said highway, and that he had not repaired it, to the common nuisance, &c. which presentment being removed into this court, the defendant pleaded that the inhabitants of *Stoke* near *Guildford* from time whereof, &c. ought to repair the said highway and

8 C. 1 Sid. 464.
2 Keb. 665.
If a man is presented for not repairing a highway by reason of tenure of lands incroached, the tenure ought to be traversed, and not the incroachment.

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traversed without this that he ought to repair the said highway *by reason of tenure*: upon which plea it was demurred in law for the king.

And the objection to the plea was, that the defendant had not answered the encroachment, which was the principal matter; to which *Saunders* for the defendant answered, that the defendant being charged to repair the highway *by reason of tenure*, &c. that was the principal matter which ought to be traversed; for if the defendant had been chargeable by reason of incroachment, he ought not to have been charged by reason of *tenure*, &c. but by reason of *incroachment* only.

And so was the opinion of the whole court. And *Kelynge* chief justice said, that if the defendant had incroached on the highway, he was thereby chargeable to repair the highway as long as the incroachment continued, but not *by reason of the tenure* of the land incroached; for as soon as the defendant leaves the incroachment open to the highway again, whereby the incroachment ceases, he is discharged * from repairing the highway for the future; but where a man is bound to repair a highway *by reason of tenure* of any lands, although he leaves them open to the highway, yet he is always bound to repair the highway; wherefore the defendant here being charged *ratione tenuræ* he was badly charged, for he ought to have been charged *by reason of the incroachment* of the said highway; but to this presentment in the manner it is, the defendant did well to traverse the *ratione tenuræ*, and could not do otherwise. (11) Wherefore it was adjudged for the defendant. *Jones* was of counsel for the king. See 1 Roll. Abr. 390. (B). pl. 1. Cro. Car. 366. Sir *Edward Duncomb's* case. (12)

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* Ambl. Rep.
295.

(11) For if he had traversed that he was bound to repair by reason of the incroachment, the traverse would have been bad, because it would have been a traverse of a matter, or conclusion of law.

(12) It seems to be established, that if a common highway is so foundrous and out of repair as to become impassable, or even dangerous to be travelled over, or incommodious, the public have a right to go upon the adjacent ground; and it makes no difference whether it be sown with grain; or not. 1 Roll.

Abr. 390. (A.) pl. 1. and (B.) pl. 1. 2 Show. 28. *Absor v. French*. Doug. 749. *Taylor v. Whitehead*. 3d edit. An inclosure of the highway takes away this liberty and convenience; and for this reason it is holden, that if the owner of lands not inclosed next adjoining to a highway, incloses his lands on both sides, he is bound to make a *perfect good way* as long as the inclosure lasts; and is not excused by shewing that he has made the way as good as it was at the time of the inclosure; because if it was then defective the public

might have gone on the adjoining land 1 Roll. Abr. 390. (B.) pl. 1. Cro. Car 366. *Duncombe's case*. Sir W. Jones, 296. *Henn's case*. Styles, 364. 2 Ld. Raym. 1170. per *Holt C. J.* 1 Hawk. P. C. c. 76. s. 6. 1 Burr. 465. *Rex v. Flecknow*. So if one incloses land on one side which has been anciently inclosed of the other side, he ought to repair all the way; but if there is no such ancient inclosure of the other side, he ought to repair but *half* the way. 1 Sid. 464. *Rex v. Staughton*. 1 Hawk. P. C. c. 76. s. 7. [k]

But where a highway is altered, changed, or inclosed *by a legal course*,

as by a writ of *ad quod damnum*, or under the authority of the statute 13 Geo. 3. c. 78. s. 19. the owner of the land is not obliged to repair the new road, unless, in the case of a writ of *ad quod damnum*, the jury impose such a condition upon him, or unless the new road lies in another parish. 3 Atk. 771, 772. *ex parte Vennor*. 1 Burr. 465. *Rex v. Flecknow*. So where a highway is inclosed under the authority of an act of parliament for dividing and inclosing open common fields, the person who incloses is not bound to repair it. 1 Burr. 465.

[k] See the observations of *Abbott C. J.*, in 2 Stark. 468. et seq. *Steel v. Prickett and others*.

Lanyon versus Carne & al' Executors of Cara.

Case 29.

Hil. 19 & 20 Car. II. Regis. Rot. 1534.

Cornwall, } **B**E it remembered that heretofore, to wit, in the term of *St. Michael* last past, before our lord the king at *Westminster* came *John Lanyon* gent. by *Arthur Painter* his attorney, and brought here into the court of our said lord the king then there his certain bill against *Robert Carne* and *Julian Cara* widow, executors of the last will and testament of *James Cara* lately deceased, in the custody of the marshall, &c. of a plea of breach of covenant, and there are pledges of prosecution, to wit, *John Doe* and *Richard Roe*, which said bill follows in these words, to wit: *Cornwall*, to wit, *John Lanyon* gent. complains of *Robert Carne* and *Julian Cara* widow, executors of the last will and testament of *James Cara* deceased, being in the custody of the marshall of the marshalsea of our lord the king before the king himself, of a plea of breach of covenant, for that whereas on the 12th day of *February* in the 15th year of the reign of our lord *Charles* the second now king of *England*, &c. by a certain indenture made at *Launceston* in the county aforesaid, between the said *John Lanyon*, by the name of *John Lanyon* of *Bobreach* in the

Same precedent.
2 Mod. Ent.
43.

Declaration in
covenant against
executors,

by indenture be-
tween plaintiff
and testator.

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CARNE & al'.

Profert.

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Plaintiff de-
mised to testator
certain pre-
mises,

except as there-
in excepted.

parish of *St. Crett* in the county of *Cornwall* gent. of the one part, and the aforesaid *James Cara*, by the name of *James Cara* of the parish of *St. Levan* in the county aforesaid yeoman, of the other part, (the other part of which said indenture sealed with the seal of the said *James Cara* in his life-time the said *John* here into court brings, the date whereof is the same day and year,) he the said *John Lanyon* for and in consideration of the sum of 240*l.* of good and lawful money of *England*, to the said *John* by the said *James* in his life-time in hand paid, and secured to be paid, before the sealing and delivery of the said indenture, and also for divers good causes and considerations him the said *John Lanyon* specially moving, had demised, granted and to farm let, and confirmed, and in and by the said indenture did demise, grant, and to farm let, and confirm, unto the said *James Cara* in his life time, his executors, administrators and assigns, all those messuages, lands, and tenements with all and singular the appurtenances, commonly called or known by the name, or names of *Tredinan*, situate, lying and being in the parish of *St. Levan* in the county aforesaid, and then or late in the tenure and occupation of *William Cara* and *William Baynard*, their assign, or assigns, and lately theretofore demised by *James Treuren* of *St. Crett* aforesaid gent. deceased to one *John Roe* of *Penryn*, together with all messuages, lands and tenements, houses, gardens, meadows, marshes, pastures, feedings, ways, paths, and easements, commons, waters, watercourses, furze and heath, and all other advantages and appurtenances to the said premises, or to any part or parcel thereof belonging, incident or in any wise appertaining (all the tin and toll of tin, and tin-works then found or wrought, or which should thereafter be found or wrought, in or upon the premises aforesaid, or any part thereof, with free liberty to dig, undermine and search for tin, and the tin then found to take and carry away with all sorts of carriages, and all the timber-trees of oak, ash and elm, and all other timber-trees whatsoever then growing, or which afterwards should grow in or upon the aforesaid premises, with liberty to cut, fell and carry away the said trees, to the said *John Lanyon*, his executors and assigns always excepted and reserved;) to have and to hold all and singular the messuages, lands and tenements aforesaid with the appurtenances, and every part and parcel thereof (except as before excepted) unto the said *James Cara*, his executors, administrators and assigns, for and during the full time and

term of 99 years fully to be complete and ended, if the said *James Cara* and *Julian Cara*, daughter of *Robert Carne* of the parish of *Burjan* in the county aforesaid yeoman, or either of them should so long happen to live, the said term to commence and begin upon and after the death of *Sibill*, wife of one *William Cara*, or the surrender, forfeiture, or other determination, of the estate in the premises granted by the said *James Trewren* to the said *John Roe*, and not before; he the said *James Cara*, his executors, administrators, yielding and paying therefore yearly during the said time, *after the commencement thereof*, to the said *John Lanyon* his heirs and assigns, the yearly rent of 40s. of lawful money of *England*, to be paid at the four most usual terms, or times of payment of rent in the year, that is to say, the *Annunciation of the Blessed Virgin Mary*, the *Nativity of St. John Baptist*, the feasts of *St. Michael the Archangel*, and the *Nativity of our Lord God*, by even and equal portions, and also a capon yearly during the said term at the feast of the *Nativity of our Lord God*, and also yielding and paying yearly, and every year *after the commencement thereof*, out of the said premises, the annual or yearly high rent, or chief rent due to the heirs and assigns of *Martin Bosistowe* gent. deceased; and also yielding and paying 3*l.* of lawful money of *England*, for the best beast, for and in the name of a heriot, or farliefe; upon and after the several deaths of the said *James Cara* and *Julian Cara*, and upon and after the several respective deaths of them, or either of them, and also a harvest-journey yearly in the time of harvest, with a man, horse and guide, for the carrying of the grain of the said *John Lanyon* his heirs and assigns to his house, upon reasonable notice given to them, as by the said indenture (among other things) more fully appears. And the said *John Lanyon* protesting, says that neither the said *James Cara* in his lifetime, nor the said *Robert Carne* and *Julian Cara* after the death of the said *James Cara*, nor either of them, performed, fulfilled or kept any of the covenants, promises, or agreements in the said indenture above specified, on the part of the said *James Cara* to be performed, fulfilled and kept according to the form and effect of the said indenture, in fact the said *John Lanyon* says, that after the making of the said indenture, to wit, on the 1st day of *October* in the 19th year of the reign of our said lord the now king at *Launceston* aforesaid in the county aforesaid, he the said *James Cara* made his last will and testament in writing, and constituted and ap-

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CARNE & al^o.

Habendum to the testator for 99 years if he and one J. C. should so long live, to commence after the death of one S. *Reddendum*, the rent of 40s. yearly, payable quarterly, and a capon at Christmas

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and also the chief rent,

and 3*l.* for a heriot on the respective deaths of the testator and the said J. C.

and a day's journey yearly.

Lessee made his will and the defendants executors, and died,

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on whose death
3l. was due for
a heriot.

Breach.

That defendants
have not paid it.

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Imparlanccr

Demurrer.

Joinder in de-
murrer.

pointed the said *Robert Carne* and *Julian Cara* executors of his said will, and afterwards, to wit, on the said day and year died, after whose death the said *Robert* and *Julian* took upon themselves the burthen of the execution of the said will ; whereupon the said 3l. for the said heriot or farliefc upon the death of the said *James Cara* became due and payable to the said *John Lanyon*, according to the form and effect of the said covenant, yet the said *Robert Carne* and *Julian Cara* not regarding the said covenants and agreements in the said indenture by the said *James* in his life-time, on his part made in that behalf, did not pay to the said *John Lanyon* the said sum of 3l. in the said indenture above-mentioned for a heriot or farliefc on the death of the said *James*, which they ought to have paid him according to the form and effect of the covenant of the said *James* in the said indenture above-mentioned ; and so the said *John Lanyon* says, that the said *Robert* and *Julian* (although often required) have not kept with the said *John Lanyon* the covenant of the said *James* in manner and form aforesaid made, but have broken the same, and to keep the same with him have altogether refused, and still do refuse : wherefore he says that he is injured, and has damage to the value of 5l. and thereof he brings suit, &c.

And now at this day, to wit, on *Thursday* next after the octave of *St. Hilary* in this same term, until which day the said *Robert* had leave to imparl to the said bill and then to answer, &c. before our lord the king at *Westminster* comes as well the said *John* by his attorney aforesaid, as the said *Robert* and *Julian* by *Hugh Gamlyn* their attorney, and the said *Robert* and *Julian* defend the wrong and injury when, &c. and say that the said *John* ought not to have or maintain his aforesaid action thereof against them, because they say that the declaration aforesaid and the matter in the same contained are not sufficient in law for the said *John* to have or maintain his action against them the said *Robert* and *Julian*, to which said declaration the said *Robert* and *Julian* have no necessity, nor are bound by the law of the land in any manner to answer. And this they are ready to verify. Wherefore for want of a sufficient declaration in this behalf the said *Robert* and *Julian* pray judgment, and that the said *John* may be barred from having his aforesaid action thereof maintained against them, &c.

And the said *John* says that he, by any thing by the said *Robert* and *Julian* above in pleading alleged, ought not to

be barred from having his aforesaid action thereof against the said *Robert* and *Julian*, because he says that the declaration aforesaid and the matter in the same contained are good and sufficient in law to compel the said *Robert* and *Julian* to answer the said declaration, which said declaration and the matter in the same contained he the said *John* is ready to verify and prove as the court, &c. and because the said *Robert* and *Julian* do not answer the said declaration, nor have in any wise hitherto denied the same, he the said *John* prays judgment and his damages on occasion of the said premises to be adjudged to him, &c. And because the court of our lord the king now here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid before our lord the king at *Westminster* until day next after to hear their judgment of and upon the premises, because the court of our said lord the king now here is thereof not yet, &c.

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CARNE & al'.

*Curia advisare
vult.*

Lanyon *versus* Carne & al'. Executors of Cara.

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Case 28.

Hil 19 & 20 Car. II. Regis. Rot. 1534.

COVENANT by *Lanyon* plaintiff against *Carne* and *Cara* executors of *Cara* defendants, the plaintiff declares that by an indenture 12th *February* in the 15th year of the reign of the now king, he demised to the testator certain lands in the county of *Cornwall*, to have and to hold for the term of 99 years, if the testator and one *Julian Cara* or either of them should so long happen to live, and that the said term, should begin upon and after the death of *Sibill* wife of one *William Cara*, or the surrender, forfeiture, or other determination of the estate formerly granted to one *John Roe*; yielding and paying therefore yearly during the said term, after the commencement thereof, to the plaintiff, his heirs and assigns, the yearly rent of 40s. by quarterly payments, and a capon yearly at the feast of *Christmas*; and also yielding and paying yearly for every year after the commencement thereof the chief rent due to the lord of the fee; and also yielding and paying 3l. of lawful money of *England* for the best beast, for and in the name of a heriot, upon and after the several respective deaths of them, or either of them;

S.C. 1 Lev. 294.
1 Vent. 91.
1 Sid. 437.
2 Keb. 505.
572. 588. 677.
A lease is made to A. for 99 years, if A. and B. or either of them shall so long live, to commence after the death of C. yielding and paying 3l. for a heriot on the respective deaths of A. and B. and A. dies living C. the heriot is of the same nature with a rent, and is not payable by the executors of A.

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and also a journey yearly in harvest-time with a man, horse, and guide for the carrying of the grain of the plaintiff to his house on reasonable notice. And the plaintiff in fact says that the testator afterwards, to wit, on the 1st day of *October* in the 19th year of the reign of the now king, made his will, and the defendants his executors, and afterwards on the same day died: whereby *3l.* became due to the plaintiff for the said heriot on the death of the testator, and the defendants had not paid it, wherefore the plaintiff brought this action: upon which declaration the defendant demurred in law. And the reason was because it was not shewn in the declaration that the term granted to the testator was commenced at the time of his death by the death of *Sibill Cara*, or otherwise. And this case was oftentimes argued by *Powlett* for the defendants, and by *Saunders* for the plaintiff.

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And, after it had depended for four or five terms, now the justices in this term delivered their opinions *seriatim*. And *Morton* puisne justice, and *Raynsford* and *Twysden* justices delivered their opinions for the defendants. And they said that the *3l.* reserved for a heriot was of the same nature with a rent, which is to be paid during the term, and not before the commencement of the term, nor after the end of it. And here this reservation must be construed more strongly against the reserver; as in *Dyer* 377. *a.* where a lessor seised in fee of a reversion, expectant on an estate for years, determinable on the death of the lessee for years, demised his reversion to a stranger for life reserving rent, *when the reversion shall happen*, to which demise of the reversion the termor for years attorned; and it was resolved that the lessor was not entitled to any rent during the continuance of the term for years, for, as is there said, the reservation shall be intended more strongly against the reserver. And to the same intent is the case of 17 *Edw. 2. Fitz. Executors*, 112. And that such heriot is in the nature of a rent which shall go with the reversion, they cited the case of *Randall v. Scory*, *Cro. Car.* 313. 2 *Roll. Abr.* 451. (P.) *S. C.* where it is said that such heriot is distrainable. Then if it be in the nature of rent or service, it is payable only during the term as rent is, and not before the commencement of the term as the plaintiff here would have it. And they thought that the intention of the parties was, that the heriot should not be paid un-

less it happened after the commencement of the term; for in the *reddendum* it is said, "yielding and paying therefore yearly during the said term, *after the commencement thereof*, the rent and heriots on the death, &c." which words, *after the commencement thereof*, do not relate to the rent, for the words, *during the term*, had sufficiently declared when and for what time the rent should be paid, and therefore the words, *after the commencement thereof*, would be vain and idle to limit the rent; but they have their proper operation as to the heriots: and the sense is that the heriots should be paid on the deaths of the testator and *Julian Cara after the commencement of the term*; and the rather because no time is limited when or for what time the annual journey is to be performed unless by the words, *during the term and after the beginning thereof*; and therefore they thought that the heriot, for which the plaintiff has now brought this action, was not due or payable by the true intention of the parties, because the testator's death was before the commencement of the term; wherefore they concluded for the defendant that the plaintiff should be barred.

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Kelynge chief-justice *contra*; and he delivered his opinion for the plaintiff; and said, that it appeared to him clearly, that the heriot in question was payable on the death of the testator whensoever it should happen, either before the commencement, or after the end, of the term. For he said, that the words were express, that the heriots should be paid on the deaths of the testator and *Julian Cara*; so that whensoever they died the heriots were payable by express reservation. And as to the construction that the other justices have put, that those heriots were in the nature of rent, and so payable only during the term, he said there was not any room for such construction, because the words are express; *et quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fieri solet*. And he cited 5 Rep. 118. *Eldrich's* case. And he said that the books which prove that in some cases a heriot reserved is distrainable do not apply to this case; for it does not appear here that the plaintiff has any estate in reversion so that he can distrain for the rent reserved, and much less for the heriots; yet none will deny that he may have an action of debt or covenant for the rent when it becomes due upon the contract, and so for the heriots. And he put the case that

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if one demise to A. for life, the remainder to B. for life, the remainder to C. for life, reserving a heriot on the death of each of them, now if B. or C. die in the life-time of A., and therefore he who so dies never enjoyed the estate, without question the heriot is due on his death, and the lessor may have an action of covenant against the executors of the party dying. So if a man seised of a reversion expectant on an estate for life grants an *interesse termini* to A. for 99 years if he should live so long, to commence after the death of the tenant for life, reserving a heriot on the death of A., and he dies in the life-time of the tenant for life, the lessor is entitled to the heriot reserved on the death of A., though he never enjoyed the estate, because it was the express contract between the parties, *et modus et conventio vincunt legem*: and so it is here; and although it seems to be a hard case that the heriot should be paid before the commencement of the term, because the testator, being the lessee, had not enjoyed the land, nor taken, nor indeed could take, any of the profits of it in his life time, yet he said that at the time of the contract, it was an equal chance whether the lessee would live so long as that the term would commence before his death, or not. And it was his own act to make such a contract; and perhaps if he would not have assented to such contract, the plaintiff, being the lessor, would not have made the lease to him; and because the testator had assented to such contract, the plaintiff being the lessor, was induced to grant him a better bargain, and had taken a less fine or consideration from him for granting the said estate, or had reserved a less rent on the lease; and this being a matter which was foreseen by the testator at the time of making the contract, it cannot now be said to be a hard case, for it is no more than his own contract. And as to the objection raised by the other justices, that the words, *after the commencement thereof*, seem to direct when the heriots should be paid, namely, after the commencement of the term, he said, that if those words had been only in the first clause of the *reddendum*, there might be some colour for applying them to the heriots and all the reservations in general; but he said that the same words are inserted not only in the beginning of the *reddendum*, but are also inserted in another clause in the *reddendum* for the payment of the chief rent, which, he thought, was a clear demonstration that the parties

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have inserted those words where they wished to have them inserted, to explain their intention, and have purposely omitted them out of those clauses, where they did not intend so to restrain the sense to the words *after the commencement thereof*. And as to the clause of reservation of the journeys, he said that the law directs when they shall be performed, namely, for so many years as the term shall endure, and no longer; and so the words, *after the commencement thereof*, are not to be intended in the clause of the reservation of the journeys, because that clause is sufficiently intelligible and certain without them; but the heriots are reserved to be paid only at a precise time, which is expressly limited on the deaths of the testator and *Julian Cara*, which are general and indefinite, and not restrained to any certain time. And in this clause, the words, *after the commencement thereof*, are omitted, which would have restrained the general words, *on the death*, to a certain and definite term, namely, on the deaths happening after the commencement of the term: and this was done on purpose by the parties, as he thought, that the reservation of the heriots, *on the death*, should not be restrained to the time which should happen after the commencement of the term; wherefore he concluded for the plaintiff that the action was well brought, and that the plaintiff ought to recover. But notwithstanding this opinion, it was adjudged for the defendants by the opinion of the other three justices. (1)

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(1) See Com. Dig. Rent (B. 9.) Copyhold (K. 19.—K. 27.) 2 Lutw. 1366, 1367. *Osborne v. Sture*.

Heriot is defined to be the best beast, or other thing, due to the lord on the death or alienation of his tenant; and may be due by tenure, which is heriot-service, or by custom. And though it was anciently holden that heriot-service was due only upon the death of a tenant in fee, 21 H. 7. 13. a. 15. a. Bro. Hariot 5. which perhaps is the case when it is due by tenure created before the statute *quia emptores terrarum*: yet it seems to be now agreed that it may be reserved on a lease for lives, or years determinable on lives, if such heriot be

reserved payable during the term; as where a lease is made for 99 years determinable on the death of A. B. and C. reserving a heriot on the death of each of them; and it is a heriot-service, because the lease is not determined, but there is a reversion to which the heriot-service may be incident. 2 Lutw. 1367. *Osborne v. Sture*. Heriot-service may be recovered either by seizure or distress; but if it be a heriot reserved upon a lease, or by deed since the statute *quia emptores terrarum* payable by tenant in fee, it is considered as rent, and can only be recovered like rent, by distress, or action of debt or covenant; but cannot be

seized. However it seems settled, that heriot-service, when *part of the ancient tenure*, may be *seized* any where, either in or out of the manor; Plow. 96. a. *Woodland v. Mantel*. Moor, 540. *Odiham v. Smith*. Cro. Eliz. 589. S. C. Bro. Hariot. 2. 2 Lutw. 1367. *Osborne v. Sture*. Fitz. Hariot. 5. 1 Salk. 356. *Austin v. Bennet*. 1 Show. 81. *Parker v. Gage*. 3 Bac. Abr. 52. Willes's Rep. 192. *Edwards v. Moseley*. Cro. Car. 260. *Major v. Brandwood*, for the property of the beast vests in the lord immediately on the death of the tenant, and therefore he may seize it any where just as he may his own property. Plow. 96. a. *Woodland v. Mantel*. Bro. Hariot. 2. And for this reason it is holden that the lord may seize a heriot in the hands of the vendee, unless the sale was *in market overt*. Kit. 134. b. But no other but the tenant's own beast can be *seized*. Cro. Car. 260. *Major v. Brandwood*. Dy. 199. b. pl. 57. Ow. 146. S. P. per *Anderson*. So where, on a lease for three lives, or 99 years determinable on three lives, there is reserved for an heriot upon the death of each life, *his or their best beast*, and the lease is *assigned*, and then one of the lives dies, the beast of the *assignee* cannot be *seized*, though the lessor may *distrain upon the land* for the best beast of the deceased tenant. 2 Roll. Abr. 451. (P.) 2 Lutw. 1369. and the lord or lessor may *distrain* for a heriot *any man's* cattle that are upon the land without the lord or lessor's default, and retain them until the heriot is paid: or now by statute 2 W. & M. c. 5. sell them, if not replevied, Cro. Car. 260. Bro. Hariot. 6. 3 Mod. 231. *Osborne v. Steward*. And therefore he cannot distrain for the heriot-service out of the manor, or lands demised. 1 Salk. 356. *Austin v. Bennet*. 2 Inst. 132. And if the tenant brings replevin,

the lord or lessor may now avow generally under the statute 11 Geo. 2. c. 19. s. 22. And it appears by this case that an action of debt, or of covenant lies to recover a heriot reserved upon a lease.

With respect to a heriot due by the custom of a manor, it may be payable on the death of every tenant, of an estate of inheritance, or for life or years; 21 H. 7. 13 & 15 Keilw. 80. Bro. Hariot. 5. Kit. 133.; or at will, 2 Buls. 196. *Hix v. Gardiner*; or upon the surrender or alienation of the tenant. 3 H. 6. 45. b. Bro. Hariot. 8. Customs 2. Kit. 134. b. So by custom, so much money may be due, or the best chattel, *loco heriotti*, and not a beast. Kit. 103. a. And as the property of it vests immediately in the lord on the death of the tenant, or on an alienation by him, the lord may seize it in any place, though he cannot distrain for it. Keilw. 82. a. 84. b. 167. a. Bro. Hariot. 2. 6, 7. 1 Show. 81. *Parker v. Gage*. 1 Salk. 356. *Austin v. Bennet*, of course he cannot seize the beast of another. Cro. Car. 260. *Major v. Brandwood*.

But a seizure for heriot-custom is not within the statute 11 Geo. 2. c. 19. s. 22. 2 Wils. 28. *Lloyd v. Winton*; therefore in replevin, as well as in trespass, if the defendant avows or justifies for heriot-custom, he ought to allege the seisin of himself, and the tenant, the custom for a heriot, the death of the tenant, and seizure of the heriot, Co. Ent. 613. a. 2 Lutw. 1309, 1310. *Baldwyn v. Noaks*.

And it is not sufficient to allege a custom to take the best beast, without saying, *for a heriot*, or *in the name of a heriot*, Dyer, 199. b.; see 1 Bos. & Pull. 282. *Parkin v. Radcliffe*. And if the heriot be eloiigned so that the lord cannot seize, he may bring trover or detinue against him who detains it. Bro.

Harlot. 6, 9. See further on the subject of heriots. Gilb. Distr. 8—11. 2d edit. 3 Bac. Abr. 48. 50, 51, 52. [a]

[a] If a tenant holding of his lord by a heriot, alien parcel of the land to another, each of them is chargeable to the lord with a heriot, for it is entire; and if the tenant purchase the land again, yet if the lord were seised of the heriot by another man, he shall have of him, the tenant, *for each portion*, a heriot. Fitz. Ab. tit. Heriot, pl. 1. Com. Dig. Copyhold, K. 21. 23. Accordingly it has been holden, that devisees of a copyhold, holding as tenants in common, have several estates to which they must be severally admitted, and for which several services are due to the lord, and several heriots on the death of each tenant; and the multiplication of heriots, &c. still continues, notwithstanding the reunion of the same land in one person, for that person shall hold the land in respect of the lord and the steward, for the purposes of fines, &c. as two tenements, and not as one. 6 East, 475. *Attree v. Scutt*.

THE END OF THE FIRST PART OF THE SECOND VOLUME.

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